TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1901.

No. 223.

LEE CLARK, PLAINTIFF IN ERROR,

vs.

MONROE D. HERINGTON.

IN ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS.

FILED JANUARY 9, 1901.

(18,015.)

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1 In the Supreme Court of the State of Kansas.

Be it remembered, that on the 9th day of November, A. D. 1899, there was filed in the office of the clerk of the supreme court of the State of Kansas, a petition in error and case-made from the district court of Labette county, which petition in error and case-made are in words and figures as follows, to wit:

2 LEE CLARK
vs.
MONROE D. HERRINGTON. } 11637.

Petition in Error & Case-made.

Filed Nov. 9, 1899.

D. A. VALENTINE,
Clerk Supreme Court.

3 In the Supreme Court of the State of Kansas.

LEE CLARK, Plaintiff in Error,
vs.
MONROE D. HERINGTON, Defendant in Error.

Petition in Error.

The said Lee Clark, plaintiff in error, complains of the said Monroe D. Herington, defendant in error, for that the said defendant in error at the May 1899 term of the district court of Labette county, Kansas, recovered a judgment by the consideration of said court against the said plaintiff in error, in the sum of $3,032.28, together with the costs of the action, in a certain action then and there pending in said court wherein the said Monroe D. Herington was plaintiff and the said Lee Clark was defendant, a case-made embracing the judgment and all the proceedings in which case duly certified, is hereto attached, marked "Exhibit A" and made a part of this petition in error.

And the said plaintiff in error avers that there is error in said record and proceedings in this to wit:

1. The said court erred in holding and deciding that the evidence was sufficient to entitle the defendant in error, plaintiff below, to a judgment against the plaintiff in error, defendant below.

2. The said court erred in not deciding that the evidence was insufficient to sustain a judgment in favor of the plaintiff below and against the defendant below.

3. The said court erred in not rendering a judgment for the defendant below for costs.

4. The said court erred in overruling the motion of the de-
4 fendant below for a new trial.

5. The said court erred in not sustaining the motion for a new trial, and in not granting the defendant below a new trial.

6. The said court erred in rendering a judgment for the plaintiff below instead of for the defendant below.

Wherefore, plaintiff in error prays that said judgment be reversed and he be restored to all things which he has lost thereby.

T. N. SEDGWICK,
Attorney for Plaintiff in Error.

Filed Nov. 9, 1899.
D. A. VALENTINE,
Clerk Supreme Court.

5 "EXHIBIT A." Filed October 25, 1899. John Mayer, Clerk, by Kate Hoagland, Deputy.

In the District Court of Labette County, Kansas.

MONROE D. HERINGTON, Plaintiff,
vs.
LEE CLARK, Defendant.

Case-made.

Be it remembered, that heretofore, to wit, on April 20th, 1899, the above-named plaintiff commenced the above action in the district court of Labette county, Kansas, by filing in the office of the clerk of said court his petition in words and figures as follows, to wit:

(Title omitted.)

The plaintiff complains of the said defendant and for his cause of action herein against him says: That on the 5th day of September, 1884, the defendant Lee Clark, in consideration of the sum of $1,600 in money to him paid, by his warranty deed conveyed to one William E. Birchmore in fee-simple the following lands, to wit: The south half of the northwest quarter, and the south half of the southwest quarter of section 22, township 15, range 5 east, in Morris county, State of Kansas.

The said deed contained a covenant on the part of the defendant, of which the following is a copy, to wit: "And the said Lee Clark does hereby covenant and agree that at the delivery hereof he is the lawful owner of the premises above granted, and seized of a good and indefeasible estate of inheritance therein, free and clear of all incumbrances, and that he will warrant and defend the same
6 in the quiet and peaceable possession of the said party of the second part, his heirs and assigns forever against all persons lawfully claiming the same." A copy of which deed is hereto attached and marked "Exhibit A." The said William E. Birchmore conveyed said land to one O. C. Price, and his heirs and assigns, together with all his rights under the said deed of warranty, and afterwards the said O. C. Price and his wife Jennie J. Price conveyed said land to the plaintiff. Copies of which said deeds are hereto attached and marked respectively, Exhibit "B and C."

The said defendant Lee Clark claimed title thereto under a land

grant of the United States of America, to the State of Kansas for the use of the Missouri, Kansas and Texas Railroad Company, and claims title under a deed from said railroad company to the said Lee Clark. That said land has been heretofore determined by authority of the United States not to be within the terms of said grant, but to be the property of the Government of the United States, subject to homestead entry under the act of Congress; that at the conveyance of said land to the said O. C. Price, the said William E. Birchmore, under his said deed from the defendant Lee Clark, put the said O. C. Price in possession of said land, who remained in possession of said land until he conveyed the same to the plaintiff, who likewise went into possession thereof, and remained in the actual possession thereof until ousted therefrom by a claimant under the act of Congress, known as the homestead law, as hereinafter stated.

That the defendant has not warranted or defended the premises to the plaintiff, but that the title to the land was in the United States; and on the — day of —— 1887, one James Cox settled upon said land under the act of Congress known as the homestead act, and dispossessed the plaintiff therefrom, and still lawfully hold the same and the possession thereof, and that at the time said deed was
7 made by the defendant, he had no title thereto whatever; but that the title was in the United States of America; by reason whereof the plaintiff has been damaged in the sum of $2,500.

Wherefore he prays judgment against the said defendant for the said sum of $2,500 and his costs herein.

JOHN H. MAHAN,
Attorney for Plaintiff.

To the clerk:

Issue summons in this cause to the sheriff of Labette county for service, returnable in 10 days. Judgment is claimed for $2,500.00.

JNO. H. MAHAN,
Plaintiff's Attorney.

"EXHIBIT A."

Deed—General Warranty.

This indenture, made this 6th day of September in the year of our Lord one thousand eight hundred and eighty-four between Lee Clark and Helen E. Clark his wife of Parsons in the county of Labette and State of Kansas of the first part and E. W. Birchmore of the second part,

Witnesseth, that the said parties of the first part, in consideration of the sum of sixteen hundred dollars to them duly paid, the receipt of which is hereby acknowledged, have sold and by these presents do grant and convey to the said party of the second part, his heirs and assigns, all that tract or parcel of land situated in the county of Morris and State of Kansas, described as follows, to wit: The south half of the northwest quarter and the north half of the southwest quarter of section twenty-two (22) township fifteen (15) range five (5) containing one hundred and sixty acres more or less, with the ap-

purtenances and all the estate, title and interest of the said
8 parties of the first part therein.

To have and to hold the same, together with all and singular the tenements, hereditaments and appurtenances thereunto belonging or in anywise appertaining, forever: And the said Lee Clark does hereby covenant and agree that at the delivery hereof he is the lawful owner of the premises above granted and seized of a good and indefeasible estate of inheritance therein free and clear of all incumbrance, and that he will warrant and defend the same in the quiet and peaceable possession of the said party of the second part, his heirs and assigns forever against all persons lawfully claiming the same.

In witness whereof, the said parties of the first part have hereunto set their hands and seals the day and year last above written.

LEE CLARK. [SEAL.]
HELEN E. CLARK. [SEAL.]

Signed, sealed and delivered in presence of
JOSEPH L. MOORE,
ROB'T ADAMS,
Witnesses to Helen E. Clark.

STATE OF NEW YORK, }
Montgomery County, } ss:

Be it remembered that on this 8th day of Sept. A. D. 1884, before me, the undersigned, Joseph L. Moore, a notary public in and for said county and State, came Helen E. Clark to me personally known to be the same person who executed the foregoing instrument and duly acknowledged the execution of the same.

In witness whereof, I have hereunto subscribed my name and affixed my official seal the day and year last above written.

JOSEPH L. MOORE,
[NOTARIAL SEAL.] *Notary Public.*

My commission expires March 30th, 1885.

STATE OF KANSAS, }
Labette County, } ss:

Be it remembered that on this 19 day of September A. D. 1884, before me, E. B. Stevens, a notary public in and for said county and
State, came Lee Clark to me personally known to be the same
9 person who executed the foregoing instrument, and duly acknowledged the execution of the same.

In witness whereof I have hereunto subscribed my name and affixed my official seal on the day and year last above written.

E. B. STEVENS,
[NOTARIAL SEAL.] *Notary Public.*

Commission expires January 29, 1887.

Said deed being endorsed as follows:

Deed. General warranty. From Lee Clark and wife to W. E. Birchmore. Entered in transfer record in my office this — day of —— A. D. 188– —— —— county clerk.

STATE OF KANSAS, } ss:
Morris County, }

This instrument was filed for record on the 7th day of October, A. D. 1884 at 8 o'clock a. m. and duly recorded in Book S on page 303. Fee $—.

A. W. SIMCOCK,
Register of Deeds.

[SEAL.]

M. R.,

Certificate of Copy.

STATE OF KANSAS, } ss:
Morris County, }

OFFICE OF REGISTER OF DEEDS.

I, Jno. S. Proonie, register of deeds in and for the county and State aforesaid do hereby certify that the warranty deed hereto attached is a true copy of the original warranty deed now on record in my office.

Witness my hand and official seal this 16 day of April, 1889.

JNO. S. PROONIE,
Register of Deeds.

[SEAL.]

Recorded vol. S, page 303 of deeds.

"EXHIBIT B."

Deed—Quitclaim.

This indenture, made this 15th day of January 1885, between W. E. Birchmore, unmarried, of Abilene in the county of Dickinson and State of Kansas of the first part, and Orlander C. Price of the second part:

Witnesseth, that the said party of the first part for and in consideration of the sum of one hundred dollars to him duly paid, has sold and by these presents does remise, release and quitclaim unto the said party of the second part, his heirs and assigns, forever, all that tract and parcel of land situated in the county of Dickinson and State of Kansas, and described as follows, to wit: The south half of the northwest quarter & north half of the southwest quarter in section twenty-two (22) in township fifteen (15) south of range five (5) east of sixth principal meridian, with the appurtenances and all the estate, title and interest of said party of the first part therein.

To have and to hold all and singular the above-described premises together with the appurtenances unto the said party of the second part, his heirs and assigns forever.

In witness whereof, the said party of the first part has hereunto set his hand — seal the day and year above written.

W. E. BIRCHMAN.

Executed and delivered in presence of

—— ——,
—— ——,
Witnesses.

STATE OF KANSAS, } ss:
Dickinson County, }

Be it remembered that on this 15th day of January, A. D. 1885, before me, a notary public in and for said county and State, came W. E. Birchmore unmarried, to me personally known to be the same persons who executed the foregoing instrument, and duly acknowledged the execution of the same.

In witness whereof, I have hereunto subscribed my name and affixed my official seal, the day and year last above written.

[NOTARIAL SEAL.] R. McCORMICK, *N. P.*

Com. expires Mar. 26, 1888.

11 Said deed being endorsed as follows:

Deed from W. E. Birchmore to O. C. Price. Entered in transfer record in my office this — day of —— A. D. 188– —— —— Co. clerk.

STATE OF KANSAS, } ss:
Morris County, }

This instrument was filed for record on the 19 day of January, A. D. 1885, at 9 o'clock a. m., and duly recorded in Book S on page 463. Fee, $—

[SEAL.] A. W. SIMCOCK,
Register of Deeds,
Per J. K.

STATE OF KANSAS, } ss:
Morris County, }

OFFICE OF REGISTER OF DEEDS.

I, Jno. S. Proonie register of deeds in and for the county and State aforesaid, do hereby certify that the quitclaim deed hereto attached is a true copy of the original quitclaim deed now on record in my office.

Witness my hand and official seal this 16 day of April, 1899.

[SEAL.] JNO. S. PROONIE,
Register of Deeds.

Recorded vol. S page 463 of deeds.

"EXHIBIT C."

This indenture, made this — day of January A. D. 1885 between Orlander C. Price and Minnie J. Price his wife, of Morris county in the State of Kansas of the first part, and Monroe D. Herrington of Dickinson county in the State of Kansas of the second part

Witnesseth, that the said parties of the first part, in consideration of the sum of fifteen thousand dollars, the receipt of which is hereby acknowledged, do by these presents grant, bargain, sell, and convey unto said party of the second part, his heirs and assigns, all
12 the following-described real estate, situated in the county of Morris and State of Kansas, to wit: The north half of the southwest quarter (¼), except twelve (12) acres off of the south side of the northwest quarter (¼) of said southwest (¼) and the north half (½) of the southeast quarter (¼) and the southeast quarter (¼) of the southeast quarter (¼) of section twenty-one (21) and all of section twenty-two (22) and the north half (½) of section twenty-six (26) all in township fifteen (15) south of range five (5) east of the sixth (6th) principal meridian, containing eleven hundred and forty-eight (1,148) acres more or less. To have and to hold the same, together with all and singular the tenements, hereditaments and appurtenances thereunto belonging or in anywise appertaining forever:

And said Orlander C. Price and Minnie J. Price for themselves, their heirs, executors or administrators, do hereby covenant, promise and agree, to and with said party of the second part, that at the delivery of these presents they are lawfully seized in their own right, of an absolute and indefeasible estate of inheritance, in fee-simple, of and in all and singular the above granted and described premises, with the appurtenances; that the same are free, clear, discharged and unincumbered of and from all former and other grants, titles, charges, estates, judgments, taxes, assessments and incumbrances, of what nature or kind soever, except a mortgage to the Traveler's Insurance Company of seventy-five hundred — to Lee Clark; and that they will warrant and forever defend the same unto said party of the second part, his heirs and assigns, against said parties of the first part, their heirs, and all and every person or persons whomsoever, lawfully claiming or to claim the same.

In witness whereof, the said parties of the first part have hereunto set their hands the day and year first above written.

13 ORLANDER C. PRICE.
MINNIE J. PRICE.

Witness:
R. E. REYNOLDS.

STATE OF KANSAS, } ss:
Dickinson County, }

Be it remembered, that on this seventh day of January A. D. 1885 before me, the undersigned, a notary public in and for the county and State aforesaid, came Minnie J. Price and Orlander C

Price her husband who are personally known to me to be the same persons who executed instrument of writing, and such person- did duly acknowledge the execution of the same.

In testimony whereof, I have hereunto set my hand and affixed my notarial seal, the day and year last above written.

[NOTARIAL SEAL.] R. E. REYNOLDS, *N. P.*

Term expires Oct. 31st, 1888.

Said deed being endorsed as follows:

Deed. General warranty, from Orlander C. Price and w-fe to Monroe D. Herington. Entered in transfer record in my office this — day of ——, A. D. 1888. —— ——, county clerk.

STATE OF KANSAS, } ss:
Morris County, }

This instrument was filed for record on the 19 day of Jan'y A. D. 1885 at 9.45 o'clock a. m., and duly recorded in Book S on page 462. Fee, $—.

A. W. SIMCOCK,
[SEAL.] *Register of Deeds.*

STATE OF KANSAS, } ss:
Morris County, }

OFFICE OF REGISTER OF DEEDS.

I, Jno. S. Proonie, register of deeds in and for the county and State aforesaid, do hereby certify that the warranty deed hereto attached is a true copy of the original warranty deed now on record in my office.

JNO. S. PROONIE,
[SEAL.] *Register of Deeds.*

14 Recorded vol. S page 462 of deeds.

And thereafter, and on August 7th, 1889, the said plaintiff filed and amendment to said petition in words and figures as follows, to wit:

(Title omitted.)

And the said plaintiff, by way of amendment to his said petition heretofore filed in this cause, avers that at the time said Lee Clark conveyed said land to said W. E. Birchmore, the said W. E. Birchmore, as a part of the consideration for said conveyance made and delivered two promissory notes of three hundred dollars ($300) each, dated September 6th, 1884, one payable in one year after said date and the other payable in two years after date, with interest at the rate of eight per cent. per annum from said date, and for which interest, coupon notes were attached to said principal notes.

And after the conveyance mentioned in the original petition made by said W. E. Birchmore to the plaintiff of the land in controversy, the plaintiff paid to the order of said Lee Clark the full amount of

said two principal notes, to wit: the sum of $1,500 which said sum the plaintiff paid to the order of the defendant on the 25th day of November, 1885; that said Birchmore, in order to secure the payment of the said notes, mortgaged the land described in the plaintiff's petition, to the said Lee Clark, and that said debt was an apparent lien upon said land at the time the plaintiff took his conveyance therefor, and the said plaintiff relying upon the validity of the title of the said Lee Clark, so conveyed to said Birchmore and by said Birchmore conveyed to the plaintiff, paid said money to the defendant by his order, for the purpose of discharging said lien upon said land, and as a part of the purchase-money of said land, and so believed at all times that said title conveyed by said Lee Clark was good until long after the payment of the said notes, to wit, the year 1887, when he first discovered that said Lee Clark had no title to said land, and that his pretended title thereto had failed, and that said land was the land of the Government of the United States and that said Lee Clark had no title thereto or interest therein.

Wherefore your plaintiff prays judgment as in his original petition.

JNO. H. MAHAN,
Attorney for Plaintiff.

And afterwards, and within due time the defendant filed its answer to said above petition as amended, which said answer is in words and figures as follows, to wit:

(Title omitted.)

1. Comes now the defendant in the above-entitled cause and for his first defense and answer herein, to the petition of the plaintiff, denies each and every allegation in said petition contained, which are not in any way inconsistent with the allegations of the second defense to be herein stated.

2. And for a second defense and further answer herein this defendant alleges and shows to the court; that the Union Pacific Railway Company, Southern branch, was on the 25 day of September, 1865, duly organized and incorporated under the act of legislature of the State of Kansas, entitled "An act to provide for the incorporation and regulation of railroad companies." Approved Feb. 13, 1865, and that on the 3 day of Feb., 1870, its name was duly changed and made the Missouri, Kansas & Texas Railway Company under which name it has since been known; that on July 26, 1866, Congress passed an act granting lands to the State of Kansas, to aid in the construction of a southern branch of the Union Pacific railway and telegraph line from Ft. Riley, Kansas to Ft. Smith, Arkansas, which said act was approved July 26, 1866; that thereafter and on December 3, 1866, the said Union Pacific Railway Company, Southern branch, now the Missouri, Kansas & Texas Railway Company, filed with the Secretary of the Interior its map of definite location of its line of road; that the land mentioned in

plaintiff's petition is within twenty miles of the line of definite location and within twenty miles of the line the said railroad has actually built and constructed through Morris county in State of Kansas, in which said county the land described in plaintiff's petition is located; that said road was built and constructed through said Morris county, State of Kansas, prior to Jan. 1, 1870; that the terms, conditions and impositions of the act of Congress approved July 26th, 1866, were duly accepted in writing by the Union Pacific Railway Company, Southern branch, now known as the Missouri, Kansas & Texas Railway Company within one year after the passage of said act, and in compliance with section 7 of said act; that on July 2, 1863, one William M. Walters made homestead entry upon said land described in plaintiff's petition, and thereafter and on October 7, 1875, said entry was cancelled by order of the Commissioner of the General Land Office, because of the failure of the said William M. Walters to comply with the law in regard to making improvements upon the same, and because the said William M. Walters had long prior to October, 1875, left and abandoned the same, and thereafter and on October 22, 1877, said land was selected by the Missouri, Kansas & Texas Railway Com-
17 pany to indemnify it under the act of July 26, 1866, for lands taken by homestead and pre-emption settlements within the 10-miles limits of the grant of land made by said act, which said selection was in compliance with the Commissioner's letter "F" dated Jan. 13, 1877,—a certified copy of which said letter is hereto attached, marked Exhibit "A" and made a part hereof for reference; which said selection was duly approved and verified by the register and receiver of the United States land office at Salina, Kansas; that a copy of said selection approved and verified by the United States Land Office is hereto attached, marked Exhibit "B" and made a part hereof for reference; that thereafter and on Jan. 10, 1884, the said Missouri, Kansas & Texas Railway Company, relying upon the validity of said selection sold said land to one I. N. McCreery of Parsons, Kansas, and made, executed and delivered to said McCreery contracts for each of said pieces of land; that on the same day, the said McCreery, for a valuable consideration to him paid, assigned both the said contracts to this defendant and that on September 5, 1884, this defendant paid the full purchase price to the said Missouri, Kansas & Texas Railway Company for said land and received from it a warranty deed for the same and that in the purchase of said land, he relied upon the validity of said selection so made as aforesaid, by the Missouri, Kansas & Texas Railway Company; and thereafter this defendant still believing and relying upon the validity of said selection and knowing the same had not been cancelled, set aside or questioned at that time, sold and conveyed the same to one, W. E. Burchmore by deed of general warranty, September 6, 1884, and the said Burchmore conveyed the same to one O. C. Price by deed of quitclaim, Jan. 15, 1885, and the said O. C. Price and wife conveyed said land by deed of general warranty to the plaintiff in this action, Jan. 15, 1885, as

alleged in plaintiff's petition, and in said several sales
18 and conveyance of said land, the said selection so made by the Missouri, Kansas & Texas Railway Company, was in full force and effect and was unquestioned by the Government or any one else, and was relied upon by each and all of the several grantees and grantors mentioned in said several deeds and said selection remained in full force and effect unquestioned up to May 13, 1886, when by the Commissioner's letter of that date an attempt was made by the Commissioner of the General Land Office to cancel said selection, but this defendant avers the fact to be that the plaintiff had become the owner of the land Jan. 15, 1885, and at the time he became the owner of the land said selection was in full force and effect; that the said plaintiff nor any of the several grantees or grantors mentioned in the several deeds set up in petition of plaintiff knew or had any reason to know of any defect in the selection made by the Missouri, Kansas & Texas Railway Company, or knew or had any reason to know why said selection was not perfectly valid; and this defendant further alleges and shows to the court that by said selection said Missouri, Kansas & Texas Railway Company became the legal and equitable owner of said land and had a perfect right at any time before same was cancelled to sell and convey the same, and that its contract of sale and conveyance was a valid transfer of said land, and that the said Lee Clark took from the Missouri, Kansas & Texas Railway Company a good and indefeasible title to said land and at the time he sold and conveyed the same to said Burchmore, he had the right to sell and convey the same, and his deed of conveyance conveyed to the said Burchmore a good and indefeasible title to said land, and that the deed made by the said Burchmore to the said Price conveyed to the said Price a good and indefeasible title to said land and that the deed made by the said Price to the said Herrington — a good and indefeasible title to said lands. And this
19 defendant further alleges and shows to the court that the attempt of cancellation of the selection made by Commissioner's letter of May 13, 1886, did not operate to cancel said selection and did not operate to divest the said plaintiff of the title he had acquired to said land, but that said attempt of cancellation was absolutely void.

And this defendant further alleges and shows to the court that it is beyond the power of the Commissioner of the General Land Office, or any executive officer of the Government, to cancel said selection of said lands so made by the Missouri, Kansas & Texas Railway Company as aforesaid, after the same had in good faith and for a valuable consideration been sold and conveyed by the Missouri, Kansas & Texas Railway Company; and this defendant further alleges and shows to the court that the said plaintiff has never been ousted of his right to the possession of said land; that if he has abandoned the same he did it voluntarily, or at the request of a pretended owner, who had no valid title thereto whatever, and that he could not in reality have been compelled to surrender his possession of the same; that the said plaintiff now has the legal title and right of possession

to said land, and can assert the same successfully in court whenever he sees fit to do so.

Wherefore, the defendant demands judgment; that his action be dismissed and that he recover his costs hereof.

T. N. SEDGWICK,
Attorney for Defendant.

EXHIBIT "A."

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
"F." WASHINGTON, D. C., *January* 13, 1877.

Register and receiver, Salina, Kansas.

20 GENTLEMEN: I have examined the case of homestead entry No. 237 made June 21, 1863, by William M. Walter for the south half of the northwest quarter and the north half of the southwest quarter of section 22–15–5 east, which entry was cancelled October 7, 1875, for abandonment.

The tract is within the indemnity limits of the grant made by the act of July 26, 1866 to the Missouri, Kansas & Texas Railway Company, the right of which attached December 3, 1866, the date of filing map of definite location of the road. This was long subsequent to the abandonment by Walter of his homestead claim, as shown by his affidavit dated December 15, 1876, and as no other claim for these tracts appears of record in this office, the same inures to the grant, and the Missouri, Kansas & Texas Railway Company will be permitted to select same.

Very respectfully, J. A. WILLIAMSON,
Commissioner.

I hereby certify that the copy attached hereto is a true and correct copy of a letter of the Hon. Commissioner of the Gen. Land Office addressed to the register and receiver of the U. S. land office at Salina, Kansas, under date of Jan. 13, 1877, and that the original letter referred to is now on file in this office.

J. M. HODGE, *Register.*

EXHIBIT "B."

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *May* 23*rd*, 1890.

I, Lewis A. Groff, Commissioner of the General Land Office, do hereby certify that the annexed copy is a true and literal ex-
21 emplification of a list of selections made by the Missouri, Kansas & Texas Railway Company on October 22, 1877, and certified by the district officers at Salina, Kansas, the 22nd day of October, 1877, as shown by the original list on file in this office, with all the endorsements thereon.

In testimony whereof, I have hereunto subscribed my name and

caused the seal of this office to be affixed, at the city of Washington, on the day and year above written.

[SEAL.] LEWIS A. GROFF,
Commissioner of General Land Office.

The Union Trust Company of New York, trustee of Missouri, Kansas & Texas railway; William Bond, general manager.

Land department: A. M. Sommers, land commissioner; N. S. Goss, land attorneys.

EMPORIA, KANSAS, *October* 20, 1877.

I hereby certify that N. S. Goss is the duly appointed land attorney for the Missouri, Kansas & Texas Railway Company, and as such, is empowered and authorized to select lands, attend to and transact any business arising before the United States land offices in the State under their grants, acts of Congress approved March 3, 1863, July 1, 1864 and July 26, 1866.

In witness whereof I have hereunto signed my name and affixed the seal of said railway company.

[SEAL.] A. M. SOMMERS,
Land Commissioner.

MISSOURI, KANSAS & TEXAS RAILWAY COMPANY,
LAND DEPARTMENT,
EMPORIA, KANSAS, *October* 22, 1877.

Register and receiver U. S. land office, Salina, Kansas:

22 The Missouri, Kansas & Texas Railway Company, late Union Pacific Railway Company, Southern branch, under and by virtue of the acts of Congress entitled, "An act making an additional grant of lands to the State of Kansas to aid in the construction of a Southern railroad and telegraph lines" approved March 3, 1863, and July 1, 1864, and an act granting lands to the State of Kansas to aid in the construction of a Southern branch of the Union Pacific and telegraph from Fort Riley, Kansas, to Ft. Smith, Arkansas, approved July 26, 1866, and under and in pursuance of the rules and regulations prescribed by the Commissioner of the General Land Office hereby makes and files the following list of selections of public lands, claimed by the said company, as inuring to it, and to which it is entitled under and by virtue of the grants and provisions of the said acts of Congress, and the location of the line of route of said company being for lands heretofore applied — but rejected on account of supposed adverse claims or conflict with other railroad grants, the selections being particularly described as follows, to wit:

Railroad List.

No.	Part of sect.	Sect.	Twp.	Range.	Acres.	Remarks.
—	S. ½ N. W. ¼ and N. ½ S. W. ¼.	22	16 S.	5 E.	160	6-32 Selection cancelled July 21, '86. See to R. & R. D. W. 70. C. S. B.

Selection posted Jan. 4, 1878. J. W. S.

STATE OF KANSAS, } ss:
County of Saline, }

I, N. S. Goss, being duly sworn depose and say that I am the land attorney of the Missouri, Kansas & Texas Railway Company, formerly Union Pacific Railway Company Southern
23 branch; that the foregoing list of lands which I hereby select, is a correct list of a portion of the public lands claimed by the said Missouri, Kansas & Texas Railway Company as inuring to them to aid in the construction of the road from Junction City, Kansas to the southern boundary of the State for which a grant of land was made by the acts of Congress approved March 3, 1863, July 1, 1864, and July 26, 1866; that the said lands are vacant, unappropriated and are not interdicted mineral or reserved lands and are of the character contemplated by the grant, being within the limits of twenty (20) miles on each side of the line of route, as heretofore applied for but rejected on account of supposed adverse claims or conflict with other railroad grants.

N. S. GOSS,
Land Attorney.

M., K. & T. R'y Co.

Subscribed and sworn to before me this 22nd day of October, 1877.

T. L. BOND, *Register.*

UNITED STATES LAND OFFICE,
SALINA, KANSAS, *October* 22, 1877.

We hereby certify that we have carefully and critically examined the foregoing list of lands claimed by the Missouri, Kansas & Texas Railway Company, formerly Union Pacific Railway Company Southern branch, under the grant to the State of Kansas, by the act of Congress approved March 3, 1863, July 1, 1864 and July 26, 1866 and selected by N. S. Goss, the duly authorized agent, and we have tested the accuracy of said list by the plats and records of this office and that we find the same to be correct; and we further certify that the filing of said list is allowed and approved and that the whole of said lands are surveyed public lands of the United States and
24 within the limits of twenty (20) miles on each side, and that the same are not nor is any part thereof, returned and denominated as mineral land or lands nor claimed as swamp lands,

nor is there any homestead, pre-emption, State or other valid claim to any portion of said lands on file or recorded in this office.

We further certify that the foregoing list shows an assessment of the fees payable to us, allowed by act of Congress, approved July 1, 1864, and contemplated by the circular of instructions dated Jan. 24, 1867, addressed by the Commissioner of the General Land Office to registers and receivers of the United States land offices and that the said company have paid to the undersigned, the receiver, the full sum of two ($2.00) dollars in full payment and discharge of said fees.

T. L. BOND, *Register.*
D. R. WAGSTAFF, *Receiver.*

And thereafter, and within due time, the plaintiff filed his reply to said answer, which said reply is in words and figures as follows, to wit:

(Title omitted.)

Comes now the said Monroe D. Herington and for reply to the answer of the said Lee Clark, defendant herein, says:

1. That he denies each and every allegation in said answer contained.

2. And for a second and further reply this plaintiff says: That the said land did not pass to the said Missouri, Kansas and Texas Railway Company, known as the Southern branch of the Union Pacific, under the grant named in said answer, nor did any part of it, and the Missouri, Kansas and Texas Railway Company never had any right, title or interest in or to said land and that none was conveyed by it to the said David Kelso or to Lee Clark, nor did any title or interest in or to said lands pass by any subsequent conveyances named in said answer. That said selection mentioned in said answer was set aside and cancelled by proper authority of the Government of the United States and that said pretended selection was unauthorized in law and conferred upon the said Missouri, Kansas and Texas Railway Company no right or interest whatever in said lands.

J. C. & C. R. MAHAN,
Att'ys for Plaintiff.

And thereafter the parties agreed upon the following statement of facts as the facts in this case, to wit:

(Title omitted.)

It is hereby stipulated by and between the plaintiff and defendant in the above-entitled cause that the same shall be tried to the court without a jury upon the following agreed statement of facts, which are hereby agreed upon and admitted to be true, and such other competent testimony as either party may offer on the trial of this cause:

I. That the Union Pacific Railway Company, Southern branch, was a corporation duly and legally organized and incorporated under and by virtue of the laws of the State of Kansas, and is the

same corporation mentioned and described in the acts of Congress of the United States entitled "An act granting lands to the State of Kansas to aid in the construction of a Southern branch to the Union Pacific railway and telegraph from Fort Riley, Kansas to Fort Smith, Arkansas" approved July 26, 1866.

26 II. That afterwards, to wit, on the 31st day of March, 1870, the said Union Pacific Railway Company, Southern branch, was in accordance with the law changed in name to that of the Missouri, Kansas & Texas Railway Company, which change of name was legally made, and by which latter name the said Union Pacific Railway Company, Southern branch is, and ever since said 31st day of March, 1870, has been known, and thereupon the said Missouri, Kansas & Texas Railway Company became, was and still is by competent authority the legal and equitable successor and owner of all the benefits, rights and franchises contained in and provided by said act of Congress; and all the rights, property, grants, franchises of whatsoever name or character theretofore held, owned and enjoyed by the said Union Pacific Railway Company, Southern branch to the full and same extent the latter company did own, hold and enjoy, or could own, hold and enjoy either under the said act of Congress or any other act of Congress, or any act of the legislature of the State of Kansas.

III. That the line and route of said railway company was definitely fixed and located through the county of Morris in the State of Kansas to the southern boundary line of said State and opposite and parallel to the land described in the petition of the plaintiff herein, and maps thereof filed with the Secretary of the Interior on the 7th day of January, 1868 as contemplated and provided in said act of Congress of July 26, 1866.

IV. That in order to secure to the said railway company the full quantity of land granted by said acts of Congress, the said land described in plaintiff's petition together with other lands was withdrawn from market and from the operation of the homestead and pre-emption laws of the United States by the Secretary of the Interior as contemplated and provided in said act of Congress on

27 the 6th day of April, 1867, which was the date the register and receiver of the U. S. land office at Salina, Kansas received notice of such withdrawal.

V. That said railway corporation duly accepted the provisions and benefits of the said act of Congress on the 6th day of December, 1866, and in pursuance thereof did proceed with the construction and completion of its said railway, and on the 6th day of June, 1870 had constructed and completed its railway as contemplated and provided from Fort Riley as aforesaid to the south boundary line of the State of Kansas.

VI. That the land described in said plaintiff's petition is situated within the indemnity limits of the grant to said railway corporation as provided by said act of Congress, and is within twenty miles from the line and route of said railway so definitely fixed, located and constructed as aforesaid.

VII. That in lieu of an equal amount of land lost to said railway

company by reason of the attachment of homestead or pre-emption right thereto as provided by said act of Congress approved July 26, 1866 when the line of said railway company was definitely located, the said railway company under the proper rules of the Department of the Interior did on October 22nd, 1877 cause to be selected, and did select, the tracts of land described in the plaintiff's petition herein, which selection was in accordance with letter "F" of the Commissioner of the General Land Office, dated January 13, 1877, a copy of which letter is hereto attached for reference.

VIII. That at the time said land was so selected by the said railway company as aforesaid, it was unimproved and without actual occupation until after September 5, 1884.

IX. That on June 2nd, 1863, one Wm. M. Walters made homestead entry # 237 of the land described in plaintiff's petition
28 and received his certificate therefor; and on October 7, 1875 his said entry was cancelled for abandonment, by Commissioner's letter "C" of said date, a copy of which said letter is hereto attached for reference.

X. That said Wm. M. Walters abandoned said land prior to December 3, 1866, as appears by his affidavit dated December 15, 1876, a copy of which affidavit is hereto attached for reference.

XI. That on the 10th day of June, 1884, the said Missouri, Kansas and Texas Railway Company sold said land to I. N. McCreery of Parsons, Kansas and gave him written contracts therefor, which he, the said I. N. McCreery, on the same day assigned to the defendant herein Lee Clark.

XII. That the said defendant, Lee Clark, paid the full purchase price of said land to said railway company and on September 5, 1884 received from the said railway company a warranty deed for the same.

XIII. That on September 6, 1884, said defendant Lee Clark and Helen Clark, his wife, for the consideration of $1,600.00 sold said land to one Wm. E. Birchmore and conveyed the same to him by warranty deed as shown in plaintiff's petition; and the said Wm. E. Birchmore thereupon took possession of the said land and enclosed the same with a fence together with other lands. And of the consideration named in said deed of said Clark and wife to said Birchmore, he the said Birchmore, paid the sum of $600.00 cash, and gave to said Clark a mortgage of $1,000.00 upon said land; and thereafter and upon the 25th day of November, 1885, the plaintiff in this action paid said sum of $1,000.00 and $30.00 interest thereon to the defendant in satisfaction of said purchase-money mortgage.

XIV. That on January 15, 1885, the said Wm. E. Birchmore for a valuable consideration to him in hand paid by one Orlando C. Price sold and by his deed of quitclaim (without covenants of bargain and sale of warranty) conveyed said land to said Price
29 as alleged in plaintiff's petition.

XV. That on the 7th day of January, 1885, the said Orlando C. Price and Minnie J. Price, his wife, for a valuable consideration sold and conveyed said land to the plaintiff, Monroe D. Herrington by

their warranty deed as shown by Exhibit "C" attached to plaintiff's petition.

XVI. That the several grantees subsequent to the defendant each in turn went into the actual possession of said land and remained in possession thereof until July 31, 1886.

XVII. That on July 31, 1886, one E. M. Cox made homestead entry #24132 for said land, which he afterwards cancelled by relinquishment March 10, 1888. That at the time of making said homestead entry he took actual and forcible possession of the land.

XVIII. That on March 10, 1888, one Byron L. Herrington made homestead entry #24381 for said land, which entry he afterwards cancelled by relinquishment on July 28, 1888.

XIX. That on July 28, 1888, one E. M. Cox made decla-tory statement #8666 claiming settlement on the said land on July 27, 1888 and afterwards made final cash proof, and final certificate #5472 issued to him on July 26, 1889.

XX. That said Lee Clark and each subsequent grantee to the defendant herein at the time of his purchase assumed and believed the M. K. & T. R'y Co. had a good title to the land.

XXI. That on July 21, 1886, the said selection of the said land by said Missouri, Kansas & Texas Railway Company was cancelled by order of Commissioner of the General Land Office contained in his letter "F" dated May 13, 1886, copy of which is hereto attached for reference; of which said order of cancellation due notice was given the said railway company and time given it in which to appeal. No appeal was ever taken by said company.

30 XXII. That no notice was ever given to the said defendant Lee Clark, or any of his grantees by the plaintiff of any contest over said land in the U. S. land office.

XXIII. That no legal proceedings of any kind were ever commenced by said E. M. Cox against the plaintiff to oust or evict him from the possession of said land.

XXIV. That upon the selection of said land by said Missouri, Kansas & Texas Railway Company on Octobor 22nd, 1877, the amount of the fees therefor was duly paid by said railway company, and a certificate of said selection was duly issued to it.

XXV. That said selection remained in full force and unquestioned by either government or any one else from said October 22, 1877 to May 13, 1886, when the same was ordered cancelled by Commissioner's letter "F" dated May 13, 1886, as appears in statement XXI.

XXVI. That the plaintiff is the assignee of the said Wm. E. Birchmore of all his rights under the deed of the defendant to the said Wm. E. Birchmore, including any breach of the covenants therein contained.

XXVII. That the only possession ever had under any of the conveyances named herein by any of the grantees of the said defendant was by fencing said land and using the same for pasturing cattle.

JNO. H. MAHAN,
Attorney for Plaintiff.
T. N. SEDGWICK,
Attorney for Defendant.

"C." DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *Oct.* 7, 1875.

31 Register & receiver, Salina, Kansas.

GENTLEMEN: Referring to your letter of Sept. 28, 1875, in which you state that the following-named claimant under the homestead law has permitted the period of seven years allowed by law for making the required proof of settlement and cultivation to expire without making such proof, that he has been notified by you in accordance with my circular of December 20, 1873, and that he has failed to show cause why his claim should not be declared forfeited and his entry canceled.

I have to state that as the party has failed to comply with the requirements of the law, his entry has this day been canceled on our files and records. You will, therefore, note the cancel-ation on you records and thereafter promptly advise us of the fact. The case referred to in the foregoing as canceled is the following, viz: Homestead entry # 237 by William M. Walter, made at Junction City, June 2nd, 1863 for the south half northwest quarter and north half southwest quarter of section 22, 15, 5 east.

Very respectfully, S. S. BURDETT,
Commissioner.

UNITED STATES LAND OFFICE,
SALINA, KANSAS, *July 22nd*, 1890.

I hereby certify that the above is a true and correct copy of Commissioner's letter "C" of Oct. 7th, 1875, now on file in this office.

C. W. BANKS, *Receiver.*

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
32 "F." WASHINGTON, D. C., *January* 13, 1877.

Register & receiver, Salina, Kansas.

GENTLEMEN: I have examined the case of homestead entry # 237 made June 2, 1863 by William M. Walters for the south half northwest quarter and north half southwest quarter section 22–15 S. R. 5 E. which entry was canceled October 7, 1875 for abandonment. The tract is within the indemnity limits of the grant made by the act of July 26, 1866 to the Missouri, Kansas and Texas Railway Company the right of which attached December 3, 1866, the date of filing map of definite location of the road.

This was long subsequent to the abandonment by Walter of his homestead claim as shown by his affidavit dated December 15, 1876, and as no other claim for these tracts appears of record in this office, the same inures to the grant and the Missouri, Kansas & Texas Railway Company will be permitted to select the same.

Very respectfully, J. A. WILLIAMSON,
Commissioner.

UNITED STATES LAND OFFICE,
SALINA, KANSAS, *July* 22, 1890.

I hereby certify that the above is a true and correct copy of Commissioner's letter "F" of January 13, 1877, now on file in this office.

C. W. BANKS, *Receiver.*

33 DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
"F." WASHINGTON, D. C., *May* 13, 1886.

Register & receiver, Salina, Kansas.

GENTLEMEN: I have considered the application of E. M. Cox to make a homestead entry for the south half northwest quarter and the north half southwest quarter section 22, tp. 15 S. R. 5 E. His application was presented Sept. 7, 1885, but was rejected by you the same day for the reason that the land was withdrawn for the Mo. Kan. and Texas R'y Co.

The land is situated in the indemnity limits of the grant to said company, and the letter of March 19, 1867, directing a withdrawal of lands for the benefit of the same was received at the local office, April 6, 1867.

The records of this office show that Wm. M. Walter filed preemption D. S. # 702 for the northwest quarter of the section July 22nd, 1861, alleging settlement the 20th of the same month. He filed D. S. # 1109 for the tracts in question June 1, 1863 alleging settlement May 2, 1863. He made homestead entry # 237 for the same tracts June 2, 1863. This entry was canceled Oct. 7, 1875 for non-completion within seven years from its date. The company selected the tracts Oct. 22nd, 1877 under the act of July 26, 1877, but patent has not issued. The tracts are situated in the limits of the grant to the Union Pacific R'y Co. Kansas division, which antedates the grant to the former company and being in an even-numbered section were reserved to the United States for disposal at double minimum rates for the purpose of reimbursing the Government for the lands granted the senior company.

34 More-ver the filings and homestead entry of Walters were all made prior to the former grant, and his entry was not canceled until after the withdrawal therefor, while his filings remain of record to the present time.

The company did not designate any tracts lost to the grant for which the tracts in question were selected. For the foregoing reasons it is held that the tracts were excluded from the operation of the grant of the Mo. Kan. & Texas R'y Co. The selection of the same by the company is therefore held for cancel-ation subject to appeal within sixty days. Should this decision become final the application of Mr. Cox will be allowed. The resident attorneys for the company will be notified from this office.

Very respectfully, S. M. STOCKSLAGER,
Acting Commissioner.

I hereby certify that the above is a true and correct copy of Commissioner's letter "F" of May 13, 1866.

C. W. BANKS, *Receiver.*

DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *March* 3, 1891.

I, Lewis H. Groff, Commissioner of the General Land Office, do hereby certify that the annexed copy of the affidavit of Wm. Walter is a true and literal exemplification of the original affidavit now on file in this office.

In testimony whereof, I have hereunto subscribed my name, and caused the seal of this office to be affixed, at the city of Washington, on the day and year above written.

35

LEWIS H. GROFF,
Commissioner of the Gen'l Land Office.

STATE OF KANSAS, }
County of Morris, } ss:

On this 15th day of December, A. D. 1876 before me a notary public in and for said county and State personally appeared Wm. M. Walters of lawful age to me well known, who upon his oath says: I am the identical Wm. M. Walters that made homestead entry #237, June 2, 1863 at the U. S. land office on the south half of the northwest quarter and the north half of the southwest quarter of section 22, township 15 of range 5, situated in the Salina land district, Kansas; that I settled on said land in 1862, broke about twenty-five acres, built a small house, fenced the land broken, and continued to cultivate the same, and reside thereon up to the first of April, 1865, when I abandoned the land, moved the house and fence away, and have since never returned to improve or claim the same, and I now voluntarily relinquish to the United States any claim I may have thereto by reason of said homestead entry, and authorize the cancellation of the same.

WM. M. WALTERS.

Subscribed and sworn to before me.

In testimony whereof, I have hereunto subscribed my name and affixed my official seal on the day and year last above written.

[SEAL.]

E. S. BERTRAM,
Notary Public.

Afterwards, to wit, and at the February 1899 term of the district court of Labette county, Kansas, said cause came on for hearing and was submitted to the court upon the agreed statement of

36

facts, said agreed statement of facts comprising all of the evidence that was submitted to the court. And thereupon, after argument of counsel for both sides, the court took said case under consideration until the next regular term thereof.

And thereafter, and at the regular May 1899 term of said court, and on the 20th day of May, 1899, said cause came on for hearing

before the court upon the agreed statement of facts at the last previous term submitted to the court; and the court, having fully considered the same and being fully advised in the premises, and after argument of counsel for both sides, finds generally in favor of the plaintiff and against the defendant, and that the plaintiff is entitled to recover of the defendant the sum of $3,032.28, together with the costs of this action.

And thereupon, and on the same day and in open court, the defendant filed its motion for a new trial, of which said motion the following is an exact copy, to wit:

(Title omitted.)

Comes now the defendant in the above-entitled cause and moves the court to set aside the judgment rendered herein, and grant the defendant a new trial for the following reasons, to wit:

1. That the decision of the court is not sustained by sufficient evidence.
2. That the decision of the court is against the evidence.
3. Error in assessment of the amount of recovery, the same being too large and excessive.

37 4. That the decision of the court is contrary to law.

5. Error of law occurring at the trial and excepted to by the defendant at the time.

T. N. SEDGWICK,
Attorney for Defendant.

Which said motion was immediately taken up by the court and, after argument of counsel for both sides and due consideration, was by the court overruled, to which ruling of the court the defendant at the time duly excepted and excepts.

And thereupon the court caused its judgment to be entered upon the journal, a copy of which said judgment of the court as entered upon the journal is as follows:

(Title omitted.)

And now on this 20th day of May, 1899, at the regular May 1899 term of this court, the above cause having been regularly reached in its regular order was called for hearing upon the agreed statement of facts heretofore introduced at a previous term of court. And the court being fully advised in the premises, find generally in favor of the plaintiff and against the defendant.

It is thereupon considered, ordered and adjudged by the court that the plaintiff do have and recover of and against the defendant the sum of $3,032.28, together with the costs of this action duly taxed at $—. And hereof let execution issue.

To all of which the defendant at the time duly excepted.

And thereupon the defendant, within due time, filed his motion for a new trial, which motion was immediately taken up by the

court and, after argument of counsel for both sides, was by the
38 court overruled, to which action of the court in overruling said motion for a new trial the defendant at the time duly excepted.

Thereupon the defendant was given sixty days in which to make and serve a case-made for the supreme court, the defendant twenty days thereafter in which to suggest amendments to the same, the said case-made to be settled and signed by the court upon five days' notice.

And thereafter, and for good cause shown, the court extended the time in which to make and serve a case-made for the supreme court to August 10th, 1899, which order extending the time to make and serve said case-made is as follows, to wit:

(Title omitted.)

For good cause shown, the time heretofore given in which to make and serve case-made for the supreme court in the above-entitled cause is hereby extended to August 10th, 1899; the time in which the plaintiff shall have to suggest amendments is not changed, except that such time to *to* suggest amendments shall not begin until the service of the case-made.

A. H. SKIDMORE,
District Judge.

The above and foregoing comprises all of the proceedings had in said cause at the February and May 1899 terms of the district court of Labette county, Kansas, where the same was pending.

T. N. SEDGWICK,
Attorney for Defendant.

39 In the Supreme Court of Labette County, Kansas.

M. D. HERRINGTON, Plaintiff,
vs.
LEE CLARK, Defendant.

Amendments to Case-made.

The said plaintiff suggests that the proposed case-made of the last trial be amended as follows, to wit:—

First.

On page 6, by changing Birchman to Birchmore, at the two places indicated by pencil marks.

Second.

That in section 12 of the agreed statement of facts, page 22, $1,800.00 be changed to $1,600.00.

These are the only suggestions I have to offer.

J. D. McCLEVERTY.

AUGUST 16, 1899.

T. N. Sedgwick, Esq., Parsons, Kans.

DEAR SIR: I return you herewith your files in Herrington vs. Clark; also the original court files and the proposed case-made. I make a couple of suggestions which are so simple that I have no doubt you will at once make the changes, and feeling confident of this, I sign your statement as prepared, that I have no suggestion to make. I do not date either of the statements signed by me
40 leaving that for you to do, and you may insert such date as you deem advisable, and so far as I am concerned you are at liberty to send the record to Judge Skidmore by mail and save yourself any further trouble in that respect.

You will notice that the name Birchman was written that way originally but changed to Birchmore.

I desire also to call your attention to the fact that the journal entry of judgment ought to recite that the judgment should bear interest at the rate of 7 % per annum, and I would be glad if you would write the clerk and direct him to add those words to the journal entry. Of course if this is not done the interest would only be six per cent. (In lead pencil—Be kind enough to send papers to clerk.)

Very respectfully, J. D. McCLEVERTY.

Service of the above and foregoing case-made is hereby accepted by me this 9th day of August, 1899.

J. D. McCLEVERTY,
Attorney for Plaintiff.

The above and foregoing case-made has been carefully examined by me and I find the same correct, and hereby return the same to the attorney for the defendant without making any suggestions of amendment thereto, this 16th day of August, 1899.

J. D. McCLEVERTY,
Attorney for Plaintiff.

41 STATE OF KANSAS, } ss:
County of Labette, }

I, the undersigned, judge of the district court of Labette county, Kansas, hereby certify that the foregoing was presented to me as a case-made in the action above entitled, the plaintiff appearing by his attorney J. D. McCleverty and the defendant appearing by his attorney, T. N. Sedgwick, and no amendments being suggested, I now settle and sign the same as a true and correct case-made, and direct that it be attested and filed by the clerk of said court.

Witness my hand at Oswego in Labette county, Kansas, this 25th day of Oct., 1899.

A. H. SKIDMORE,
District Judge.

[SEAL.]

Attest: JOHN MAYER,
Clerk District Court,
By KATE HOAGLAND, *Deputy.*

Filed Nov. 9, 1899. D. A. VALENTINE,
Clerk Supreme Court.

42 And on the same day there was filed in the office of the clerk of the supreme court of the State of Kansas, a bond for costs, which, with the endorsements thereon is in the words and figures as follows, to wit:

43 In the Supreme Court of Kansas.

LEE CLARK, Plaintiff in Error,
vs.
MONROE D. HERINGTON, Defendant in Error. } Security for Costs.

We, and each of us, enter as security for all costs which may accrue to said defendant in error, or to the officers of this court herein. And in default of payment by said plaintiff in error of said costs, and after ten days' notice, we agree that execution may issue against our property for unpaid costs.

E. R. STEVENS.

(Endorsed on back:) 11637. Lee Clark *vs.* Monroe D. Herrington. Bond for costs. Approved and filed Nov. 9, 1899. D. A. Valentine, clerk supreme court. This bond is perfectly good. —— ——, attorney for plaintiff in error.

44 And afterward, on the 13th day of November, 1899, there was filed in the office of the clerk of the supreme court of the State of Kansas, an entry of appearance and waiver of the issuance and service of summons in error, which with the endorsements thereon is in the words and figures as follows, to wit:

45 In the Supreme Court of the State of Kansas.

LEE CLARK, Plaintiff in Error,
vs.
MONROE D. HERINGTON, Defendant in Error.

Entry of Appearance.

I hereby enter the appearance of the defendant in error in the above cause, and waive the issuance and service of a summons in error upon him in said cause.

J. D. McCLEVERTY,
Attorney of Record for Defendant in Error.

(Endorsed on back as follows:) 11637. Clark *vs.* Herington. Waiver of summons. Filed Nov. 12, 1898. D. A. Valentine, clerk supreme court.

46 And be it further remembered, that on the 1st day of March, 1900, the same being one of the regular judicial days of the January 1900 term of the supreme court of the State of Kansas, said court being in session at its court-room in the city of Topeka there being present the Honorable Frank Doster, chief justice; the Honorable William A. Johnston and the Honorable William R.

Smith, associate justices, the following proceeding was had and remains of record as follows, to wit:

47 *Journal Entry of Assignment.*

The following causes were ordered assigned for hearing at the March 1900 session of this court:

CLARK
vs.
HERINGTON. } No. 11637.

48 And afterwards, on the 11th day of April, 1900, there was filed in the office of the clerk of the supreme court of the State of Kansas, proof of service of the brief of plaintiff in error, which with the endorsements thereon is in the words and figures as follows, to wit:

49 In the Supreme Court of the State of Kansas.

LEE CLARK, Plaintiff in Error,
vs.
MONROE D. HERINGTON, Defendant in Error. } No. 11637.

Received of T. N. Sedgwick, attorney for plaintiff in error in the above-entitled cause, four copies of the brief of said plaintiff in error, this 7th day of April, 1900.

J. D. McCLEVERTY,
Attorney for Defendant in Error.

(Endorsed on back as follows:) 11637—Lee Clark, *vs.* Monroe D. Herington. Proof of service of pl'ff's brief. Filed Apr. 11, 1900. D. A. Valentine, clerk supreme court.

50 Be it further remembered, that on the 3rd day of May, 1900, the same being one of the regular judicial days of the January 1900 term of the supreme court of the State of Kansas, said court being in session at its court-room in the city of Topeka, there being present the Honorable Frank Doster, chief justice, the Honorable William A. Johnston and the Honorable William R. Smith, associate justices, the following proceeding was had and remains of record, as follows, to wit:

51 *Journal Entry of Continuance.*

LEE CLARK, Pl'ff in Error,
vs.
MONROE D. HERINGTON, Def't in Error. } 11637.

On motion of David Martin, attorney for def't in error, it is ordered that the further hearing of this cause be continued to the October 1900 session of this court.

52 And afterwards, on the 5th day of May, 1900, there was filed in the office of the clerk of the supreme court of the State of Kansas, a stipulation, which, with the endorsements thereon, is in the words and figures as follows, to wit:

53 In the Supreme Court of the State of Kansas.

LEE CLARK, Plaintiff in Error,
vs.
MONROE D. HERINGTON, Defendant in Error. } No. 11637.

Stipulation.

It is agreed that this case may be passed to the June 1900 sitting of this court with leave to either party to file brief which may be deemed proper in the case, giving at least ten days' written notice thereof to the other party before the hearing.

T. N. SEDGWICK,
Attorney for Plaintiff in Error.
DAVID MARTIN,
Attorney for Defendant in Error.

Topeka, Kansas, May 2, 1900.

(Endorsed on back as follows:) No. 11637. Lee Clark *vs.* Monroe D. Herington. Stipulation to pass to June 1900 sitting. Filed May 5, 1900. D. A. Valentine, clerk supreme court.

54 And afterwards on the 21st day of May, 1900, there was filed in the office of the clerk of the supreme court of the State of Kansas, a certified copy of an order of extension of time to make case for the supreme court, which certified copy of said order with the endorsements thereon is in the words and figures as follows, to wit:

55 In the District Court of Labette County, Kansas.

MONROE D. HERRINGTON, Plaintiff,
vs.
LEE CLARK, Defendant. } Extension of Time in which to Make Case for Supreme Court.

For good cause shown, the time heretofore given in which to make and serve case-made for the supreme court in the above-entitled cause is hereby extended to August 10th, 1899; the time in which the plaintiff shall have to suggest amendments is not changed, except that such time to suggest amendments shall not begin until the service of the case-made.

A. H. SKIDMORE,
District Judge.

Endorsed: 4177.—In the district court of Labette county, Kansas. Monroe D. Herrington, plaintiff, *vs.* Lee Clark, defendant.—Extension of time to make case.—Filed July 14, 1899, John Mayer, clerk district court.

STATE OF KANSAS, } ss:
Labette County, }

I, John Mayer, clerk of the district court within and for the county of Labette in the eleventh judicial district of the State of Kansas, do hereby certify that the above and foregoing is a true, complete and perfect copy of the order of extension of time to make case—filed in the case of Herrington *vs.* Clark, No. 4177, as the same remains on file and of record in my office.

56 Witness my hand and the seal of said court this 14th day of May A. D. 1900.

[SEAL.]

JOHN MAYER,
Clerk of the District Court,
Labette County, Kansas.

(Endorsed on back as follows:) 11637. Monroe D. Herington *vs.* Lee Clark. Certified copy of allowance of time to file case-made. Filed May 21, 1900. D. A. Valentine, clerk supreme court.

57 And on the same day there was filed in the office of the clerk of the supreme court of the State of Kansas, a motion to dismiss, which, with the endorsements thereon, is in the words and figures as follows, to wit:

58 In the Supreme Court of the State of Kansas.

LEE CLARK, Plaintiff in Error,
vs.
MONROE D. HERINGTON, Defendant in Error. } No. 11637.

Motion to Dismiss.

And now comes the defendant in error, Monroe D. Herington, appearing specially for the purposes of this motion only, and moves the court to dismiss the proceeding in error on the part of the defendant in error, Lee Clark, and as grounds for this motion this defendant in error says:

1. This cause is brought to this court not upon a certified transcript of the record, but upon a so-called case-made which is insufficient and void.

2. The case-made was not served within the time originally allowed by the court (60 days from May 20, 1899), and it does not appear that the time was extended before the expiration of said 60 days. (Pp. 31–32.)

3. It does not appear that said case-made was settled by or before the judge who tried the cause.

4. It appears from said case-made that the proceedings included therein embody only those of the February and May terms, 1899, of said court, (p. 32), whereas the action was commenced April 20, 1889, (p. 1.) And it does not appear that other proceedings
59 important and necessary for the consideration of the questions involved were not had at and during other terms of the court than the two mentioned.

5. This action was originally commenced April 20, 1889 by said Monroe D. Herington against said Lee Clark to recover damages for the breach of certain covenants of warranty of the title of real estate, and the principal question involved was whether said Lee Clark had the title thereto or not when he conveyed the same to said Monroe D. Herington, whether there was a breach of the covenants or not, and if there was a breach then the amount of damages recoverable. Said cause was tried in the district court on an agreed statement of facts and some other evidence October 29, 1891, and resulted in a judgment in favor of said Lee Clark, but the said Monroe D. Herington prosecuted a proceeding in error in this court, (No. 8249), which on April 11, 1896 reversed said judgment and held, decided and adjudged that said Lee Clark had no title to the land when he made the said covenants to said Monroe D. Herington, and that the latter had been evicted by title paramount, and this court remanded the cause to the district court for a trial and determination of the amount of damages which said Monroe D. Herington had sustained. (56 Kan. 644.)

Notwithstanding the terms of said judgment of this court, however, when the cause came on again for trial in the district court that tribunal entirely ignored and disregarded the judgment of this court, and again rendered a judgment in favor of the said Lee Clark; but the said Monroe D. Herington prosecuted another proceeding in error in this court, (No. 10909), which on December 10, 1898 reversed said judgment and again held, decided and adjudged that said Lee Clark had no title to said land when he made the said covenants to said Monroe D. Herington, and that the
60 latter had been evicted by title paramount, and this court again remanded the cause to the district court for the determination of the damages to said Monroe D. Herington on such evidence as the parties should see fit to produce. (55 Pac. Rep. 462.)

On the second remanding of said cause the said trial court obeyed the mandate, and upon the agreed statement of facts, introduced on each and all of said trials, found and adjudged the damages to said Monroe D. Herington to be $3,032.28 in accordance with the rule laid down by this court in its last decision of this case.

But notwithstanding the foregoing facts and the expressed terms of the judgments and opinions of this court in this cause, the present proceeding in error is not prosecuted for the purpose of challenging the amount or measure of damages adjudged by the court, but only the matter relating to the title and the eviction, which questions have already been twice adjudged adversely to the said Lee Clark, all of said proceedings in error having been in this cause, and there is nothing to adjudicate upon the present proceeding in error, prosecuted by the said Lee Clark, except what has been already twice adjudicated by this court.

The records in said former proceedings in error, including the judgments and mandates of this court therein, and other evidence, will be offered on the hearing of this motion.

DAVID MARTIN,
Attorney for Defendant in Error for this Motion Only.

(Endorsed on back as follows:) No. 11637—Lee Clark—*vs.*—Monroe D. Herington. Motion to dismiss. Filed May 21, 1900. D. A. Valentine, clerk supreme court. David Martin, attorney for defendant in error for this motion only.

61 And afterwards, on the 6th day of June, 1900, there was filed in the office of the clerk of the supreme court of the State of Kansas, an affidavit of John Mayer, clerk of the district court of Labette county, Kansas, together with a certified copy of the order of extension of time in which to make case for the supreme court, attached thereto, which affidavit and certified copy of order with the endorsements thereon are in words and figures as follows, to wit:—

62 In the District Court of Labette County, Kansas.

MONROE D. HERINGTON, Plaintiff,
vs.
LEE CLARK, Defendant.

STATE OF KANSAS,
County of Labette, } ss:

John Mayer, of lawful age, being first duly sworn, upon oath deposes and says that he is the clerk of the district court of Labette county, Kansas; that he has been such clerk for about three years last past; that he was such clerk of the district court in February and May, 1899; that he is acquainted with Hon. A. H. Skidmore, the judge of said district court; that he is also acquainted with the case of Monroe D. Herington *vs.* Lee Clark, and was present in court when all the proceedings were had in said case at the February and May 1899 terms of said court; that at both the February and May 1899 terms of said court the Hon. A. H. Skidmore presided as district judge, and was the presiding judge before whom the case of Monroe D. Herington *vs.* Lee Clark was heard and tried, and before whom all the proceedings were had in said cause at said February and May 1899 terms of said court; that he is the same A. H. Skidmore who allowed, settled and signed the case-made, and at the time of allowing, settling and signing said case-made he was still the duly elected, qualified and acting district judge of the district court of Labette county, Kansas, and the same judge before whom said case of Monroe D. Herington *vs.* Lee Clark was tried at
63 the February and May terms of said court. And further affiant saith not.

[SEAL.] JOHN MAYER.

Subscribed and sworn to before me this 31 day of May, A. D. 1900.

L. W. CRAIN,
Probate Judge Probate Judge *of Labette County, Kansas.*

My commission expires ——.

64 In the District Court of Labette County, Kansas.

MONROE D. HERRINGTON, Plaintiff, vs. LEE CLARK, Defendant. } Extension of Time in which to Make Case for Supreme Court.

Be it remembered, that heretofore to wit, on the 14 day of July 1899, the following proceedings were had and entered upon the journal of this court in the above cause to wit:

For good cause shown, the time heretofore given in which to make and serve case-made for the supreme court in the above-entitled cause is hereby extended to August 10th, 1899; the time in which the plaintiff shall have to suggest amendments is not changed, except that such time to suggest amendments shall not begin until the service of the case-made.

A. H. SKIDMORE,
District Judge.

Endorsed as follows: No. 4177. In the district court of Labette county, Kansas. Monroe D. Herrington, plaintiff, *vs.* Lee Clark, defendant. Extension of time to make case. Filed Jul- 14, 1899. John Mayer, clerk district court.

STATE OF KANSAS, *Labette County,* } *ss:*

I, John Mayer, clerk of the district court within and for the county of Labette in the eleventh judicial district of the State of Kansas, do hereby certify that the above and foregoing is a true, complete and perfect copy of the order made by court of extension of time to make case-made in the case of Monroe D. Herington *vs.* Lee Clark, No 4177, as the same remains on file and of record in my
65 office.

Witness my hand and the seal of said court this 2nd day of June, A. D. 1900.

[SEAL.]

JOHN MAYER,
Clerk of the District Court, Labette County, Kansas.

(Endorsed on back as follows:) No. 11637. In the supreme court. Monroe D. Herington *vs.* Lee Clark. Affidavit and court order. Filed Jun- 6, 1900. D. A. Valentine, clerk supreme court.

66 And on the same day, the same being one of the regular judicial days of the January 1900 term of the supreme court of the State of Kansas, said court being in session at its court-room in the city of Topeka, there being present the Honorable Frank Doster, chief justice the Honorable William A. Johnston and the Honorable William R. Smith, associate justices, the following proceeding was had and remains of record as follows, to wit:—

67 *Journal Entry of Submission of Motion to Dismiss.*

LEE CLARK, Pl'ff in Error,
vs.
MONROE D. HERINGTON, Def't in Error. } 11637.

Now comes on to be heard the motion of defendant in error to dismiss this cause for the reasons set forth in said written motion filed herein; and thereupon said motion is submitted on brief of counsel for plaintiff in error and taken under advisement by the court.

68 And be it further remembered, that afterwards, on the 9th day of June, 1900, the same being one of the regular judicial days of the January, 1900, term of the supreme court of the State of Kansas, said court being in session at its court-room in the city of Topeka, there being present the Honorable Frank Doster, chief justice; the Honorable William A. Johnston and the Honorable William R. Smith, associate justices, the following proceeding was had and remains of record, as follows, to wit:—

69 *Journal Entry of Decision of Motion to Dismiss.*

LEE CLARK, Pl'ff in Error,
vs.
MONROE D. HERINGTON, Def't in Error. } 11637.

Now comes on for decision the motion of defendant in error to dismiss this cause; and thereupon it is ordered that said motion be denied.

70 And be it further remembered, that afterwards, on the 27th day of June, 1900, the same being one of the regular judicial days of the January 1900 term of the supreme court of the State of Kansas, said court being in session at its court-room in the city of Topeka, there being present the Honorable Frank Doster, chief justice; the Honorable William A. Johnston and the Honorable Willaim R. Smith, associate justices, the following proceeding was had and remains of record, as follows, to wit:—

71 *Journal Entry Allowing Bill of Exceptions.*

LEE CLARK, Pl'ff in Error,
vs.
MONROE D. HERINGTON, Def't in Error. } 11637.

Now comes defendant in error by David Martin, his attorney, and presents his bill of exceptions to the ruling and decision of this court on his motion to dismiss heretofore overruled and denied, and moves the court that said bill of exceptions be allowed and signed and that the same be filed and made a part of the record herein; and there-

upon it is ordered that said motion be sustained, and that the bill of exceptions of the defendant in error to the ruling of the court denying his motion to dismiss this cause be allowed and signed as prayed for, and that the same be filed and made a part of the record herein.

72 And on the same day there was filed in the office of the clerk of the supreme court of the State of Kansas, and made a part of the record herein, a bill of exceptions, which, with the endorsements thereon, is in the words and figures as follows, to wit:

73 In the Supreme Court of the State of Kansas.

LEE CLARK, Plaintiff in Error,
vs.
MONROE D. HERINGTON, Defendant in Error. } No. 11637.

Bill of Exceptions.

Be it remembered that on May 21, 1900 the defendant in error filed his motion to dismiss this action, the same being in the words and figures following, to wit:

"In the Supreme Court of the State of Kansas.

LEE CLARK, Plaintiff in Error,
vs.
MONROE D. HERINGTON, Defendant in Error. } No. 11637.

Motion to Dismiss.

And now comes the defendant in error, Monroe D. Herington, appearing specially for the purposes of this motion only, and moves the court to dismiss the proceeding in error on the part of the defendant in error Lee Clark, and as ground for this motion this defendant in error says:

1. This cause is brought to this court not upon a certified transcript of the error, but upon a so-called case-made, which is insufficient and void.

2. The case-made was not served within the time originally allowed by the court, (60 days from May 20, 1899,) and it does not appear that the time was extended before the expiration of said 60 days. (Pp. 31–32.)

3. It does not appear that said case-made was settled by or before the judge who tried the cause.

74 4. It appears from said case-made that the proceedings included therein embody only those of the February and May terms, 1899, of said court, (p. 32,) whereas the action was commenced April 30, 1899, (p. 1.) And it does not appear that other proceedings, important and necessary for the considerations of the questions involved, were not had at and during other terms of the court than the two mentioned.

5. This action was originally commenced April 20, 1889, by said Monroe D. Herington against said Lee Clark, to recover damages for the breach of certain covenants of warranty of the title of real estate, and the principal question involved was whether said Lee Clark had the title thereto or not when he conveyed the same to said Monroe D. Herington, whether there was a breach of the covenants or not, and if there was a breach then the amount of damages recoverable. Said cause was tried in the district court on an agreed statement of facts and some other evidence October 29, 1891 and resulted in a judgment in favor of said Lee Clark, but the said Monroe D. Herington prosecuted a proceeding in error in this court, (No. 8249,) which on April 11, 1896, reversed said judgment and held, decided and adjudged that said Lee Clark had no title to the land when he made the said covenants to the said Monroe D. Herington, and that the latter had been evicted by title paramount, and this court remanded the cause to the district court for a trial and determination of the amount of damages which said Monroe D. Herington had sustained. (56 Kan., 644.)

Notwithstanding the terms of said judgment of this court, however, when the cause came on again for trial in the district court that tribunal entirely ignored and disregarded the judgment of this court, and again rendered a judgment in favor of the said Lee Clark; but the said Monroe D. Herington prosecuted another proceeding in error in this court (No. 10909,) which on December 10, 1898
75 reversed said judgment and again held, decided and adjudged that said Lee Clark had no title to said land when he made the said covenants to said Monroe D. Herington, and that the latter had been evicted by title paramount, and this court again remanded the cause to the determination of the damages to said Monroe D. Herington on such evidence as the parties should see fit to produce. (55 Pac. Rep., 462.)

On the second remanding of said cause the said trial court obeyed the mandate, and upon the agreed statement of facts, introduced on each and all of said trials, found and adjudged the damage to said Monroe D. Herington to be $3,032.28 in accordance with the rule laid down by this court in its last decision of this case.

But notwithstanding the foregoing facts and the expressed terms of the judgments and opinions of this court in this cause, the present proceeding in error is not prosecuted for the purpose of challenging the amount or measure of damages adjudged by the court but only the matter relating to the title and the eviction, which questions have already been twice adjudged adversely to the said Lee Clark, all of said proceedings in error having been in this cause, and there is nothing to adjudicate upon the present proceeding in error, prosecuted by the said Lee Clark, except what has been already twice adjudicated by this court.

The records in said former proceedings in error, including the judgments and mandates of this court therein, and other evidence, will be offered on the hearing of this motion.

DAVID MARTIN,

Attorney for Defendant in Error for this Motion Only."

The said motion came on for hearing before the court in open session at the June sitting of the January term, 1900, of the court, and in support of said motion the defendant in error, Monroe
76 D. Herington offered in evidence the records in cases No. 8249 and 10909 respectively in this court, which were former proceedings in error in this court in the same cause and controversy.

Said cause No. 8249 was filed in this court March 21, 1892, by said Monroe D. Herington against the said Lee Clark, for the purpose of reversing a judgment of the district court of Labette county, Kansas, rendered at the October term 1891. Said petition in error, except the exhibit, being as follows, to wit:

"In the Supreme Court of the State of Kansas.

LEE CLARK, Plaintiff in Error,
vs.
MONROE D. HERINGTON, Defendant in Error.

Petition in Error.

The said Lee Clark, plaintiff in error, complains of the said Monroe D. Herington, defendant in error, for that the said defendant in error at the May 1899 term of the district court of Labette county, Kansas, recovered a judgment by the consideration of said court against the said plaintiff in error, in the sum of $3,032.28, together with the costs of the action, in a certain action then and there pending in said court wherein the said Monroe D. Herington was plaintiff and the said Lee Clark was defendant, a case-made embracing the judgment and all *in* proceedings in which case duly certified, is hereto attached, marked "Exhibit A" and made a part of this petition in error.

And the said plaintiff in error avers that there is error in said record and proceedings in this, to wit:

1. The said court erred in holding and deciding that the evidence was sufficient to entitle the defendant in error, plaintiff below, to a judgment against the plaintiff in error, defendant below.
77 2. The said court erred in not deciding that the evidence was insufficient to sustain a judgment in favor of the plaintiff below and against the defendant below.
3. The said court erred in not rendering a judgment for the defendant below for costs.
4. The said court erred in overruling the motion of the defendant below for a new trial.
5. The said court erred in not sustaining the motion for a new trial, and in not granting the defendant below a new trial.
6. The said court erred in rendering a judgment for the plaintiff below instead of for the defendant below.

Wherefore, the plaintiff in error prays that said judgment be reversed and he be restored to all things which he has lost thereby.

T. N. SEDGWICK,
Attorney for Plaintiff in Error."

It appears from the petition in error and exhibit that the action was originally commenced April 20, 1889 by said Monroe D. Herington against said Lee Clark, to recover damages for the breach of certain covenants of warranty of title of real estate, and the questions involved were whether said Lee Clark had the title thereto or not when he conveyed the same to said Monroe D. Herington; whether there was a breach of the covenant or not, and, if there was a breach then the amount of damages recoverable.

The pleadings appearing in said case No. 8249, were identical with the pleadings appearing in the present proceeding in error, and the agreed statement of facts identical with the agreed statement of facts appearing in the record of the present proceeding in error. (See pp. 20 to 28 both inclusive of the present proceeding in error.)

In the trial of said case at the October term 1891 of the district court of Labette county the proceedings in which trial appear
78 in case No. 8249, the said M. D. Herington introduced in evidence a patent for the land in controversy to Elbridge M. Cox, which patent was not introduced in evidence on the trial of the case in said district court which is brought up in the present proceeding in error, No. 11637. Said patent being in the words and figures following, to wit:

"*Certificate No.* 5472.

THE UNITED STATES OF AMERICA:

To all to whom these presents shall come, Greeting:

Whereas, Elbridge M. Cox, of Morris county, Kansas, has deposited in the General Land Office of the United States a certificate of the register of the land office at Salina, Kansas, whereby it appears that full payment has been made by the said Elbridge M. Cox according to the provisions of the act of Congress of the 24th of April 1880, entitled 'An act making further provision for the sale of the public lands' and the acts supplemental thereto for the south half of the northwest quarter, and the north half of the southwest quarter of section twenty-two, in township fifteen, south of range five (5) east of the sixth principal meridian, in Kansas, containing one hundred and sixty acres according to the official plat of the survey of the said land returned to the General Land Office by the surveyor general, which said tract has been purchased by the said Elbridge M. Cox.

Now, know ye, that the United States of America, in consideration of the premises, and in conformity with the several acts of Congress in such case made and provided, have given and granted, and by these presents do give and grant unto the said Elbridge M. Cox, and to his heirs, the said tract above described, to have and to hold, the same together with all the rights, privileges, immunities and appurtenances, of whatsoever nature thereunto belonging, unto the said Elbridge M. Cox, and to his heirs and assigns forever.

In testimony whereof, I Benjamin Harrison, President of the
79 United States of America have caused these letters to be made patent and the seal of the General Land Office to be hereunto affixed.

Given under my hand at the city of Washington, the fifteenth day of October in the year of our Lord one thousand eight hundred and ninety, and of the Independence of the United States the one hundred and fifteenth.

By the President:

BENJAMIN HARRISON,
By ELLEN M:FARLAND,
Ass't Secretary.

J. M. TOWNSEND,
Recorder of the General Land Office.

Recorded vol. 7 page 225."

But there was introduced in evidence in the last trial brought up in the proceeding in error No. 11637, a department certificate of affidavit of date March 3, 1891, which was not introduced in evidence in the trial, the proceedings of which appear in case No. 8249, said department certificate of affidavit being as follows, to wit:

"DEPARTMENT OF THE INTERIOR,
GENERAL LAND OFFICE,
WASHINGTON, D. C., *March* 3, 1891.

I, Lewis H. Groff, Commissioner of the General Land Office, do hereby certify that the annexed copy of the affidavit of Wm. Walter is a true and literal exemplification of the original affidavit now on file in this office.

In testimony whereof, I have hereunto subscribed my name, and caused the seal of this office to be affixed, at the city of Washington on the day and year above written.

LEWIS H. GROFF,
Commissioner of the Gen'l Land Office."

"STATE OF KANSAS, } ss:
County of Morris, }

On this 15th day of December A. D. 1876 before me a notary public in and for said county and State personally appeared Wm.
80 M. Walters of lawful age to me well known, who upon his oath says: I am the identical Wm. M. Walters that made homestead entry # 237, June 2, 1863 at the U. S. land office on the south half of the northwest quarter of section 22, township 15 of range 5, situate in the Salina land district, Kansas; that I settled on said land in 1862, broke about twenty-five acres, built a small house, fenced the land broken, and continued to cultivate the same, and reside thereon up to the first of April 1865, when I abandoned the land, moved the house and fence away, and have since never returned to improve or claim the same, and I now voluntarily relinquish to the United States any claim I may have thereto by reason of said record homestead entry, and authorize the cancellation of the same.

WM. M. WALTERS.

Subscribed and sworn to before me. In testimony whereof, I have hereunto subscribed my name and affixed my official seal on the day and year last above written.

[SEAL.] E. S. BERTRAM,
Notary Public."

And the foregoing were the only differences in the evidence introduced in said two trials appearing respectively in proceedings in error, Nos. 8249 and 11637.

Said trial at October term 1891 in the district court of Labette county, Kansas, resulted in a judgment in favor of said Lee Clark, but the said Monroe D. Herington prosecuted said proceeding in error in this court, No. 8249, and this court on April 11, 1896 reversed said judgment, and held, decided and adjudged that said Lee Clark had no title to the land when he made said covenants to said Monroe D. Herington, and the latter had been evicted by title paramount, and this court remanded the cause to said district court for trial and determination of the amount of damages which
81 the said Monroe D. Herington had sustained. The syllabus, statement and opinion of this court upon said petition in error, No. 8249, is truly reported in vol. 56 of Kansas Report at pages 644 to 652 inclusive, the same being as follows, to wit:

"MONROE D. HERINGTON
vs.
LEE CLARK. } No. 8249.

1. Public lands—Conflicting railroads grants.—The even-numbered sections within the place limits of the land grant to the Union Pacific Railway Company, Eastern division, were reserved by act of Congress and held for disposal only at double minimum rates. A part of the same was within the indemnity limits of the grant made to the State to aid in the construction of the Missouri, Kansas & Texas railway, but, being already reserved to the United States for a specific purpose, it was not subject to selection by the latter company to supply deficiencies existing within the place limits of its grant.
2. Title in the United States.—Until the lands within the indemnity limits were actually selected and specifically set apart under the direction of the Secretary of the Interior for indemnity purposes, the title thereto did not vest in the railway company, but remained in the United States and subject to its disposal.
3. Reservation—Ineffectual selection.—A selection for indemnity purposes by permission of the Commissioner of the General Land Office of lands reserved to the United States for another specific purpose is ineffectual, and does not preclude the Land Department thereafter devoting the lands to the purposes for which they were reserved.
4. Covenant of warranty—Paramount title.—In an action to recover upon a covenant of warranty, the general rule is that the grantee can yield possession only to a hostile assertion of a

paramount title; but where the title to the land in controversy is in the United States, and liable to entry and settlement
82 under the homestead laws of the Government to all who possess the proper qualifications, that, of itself, is such a hostile assertion of the paramount title as will authorize the grantee to voluntarily submit to it." (K. P. Rly. Co. *v.* Dunmeyer, 19 Kan. 539.)

Error from Labette district court.

Action by Monroe D. Herington to recover from Lee Clark on the covenants contained in a conveyance of a quarter section of land in Morris county.

It was tried upon an agreed statement of facts, among which the following appear: For the purposes of aiding the Union Pacific Railway Company, Southern branch, the name of which was duly changed to the Missouri, Kansas & Texas Railway Company, a grant of the public land was made by an act of Congress approved July 26, 1866. The line of the railway was definitely fixed opposite and parallel to the land in question and through to the southern boundary of the State on January 7, 1868. The railway company accepted the provisions of the act of Congress on December 6, 1866, and in pursuance thereof had constructed and completed its railway from Fort Riley to the southern line of the State on June 6, 1870. The land in question was within the indemnity limits of the grant made by act of Congress—that is, within 20 miles of the line and route of the railway. In lieu of an equal amount of land within the place limits lost to the railway company by reason of the attachment of homestead or pre-emption rights thereto, the railway company, under the proper rules of the Department of the Interior, did, on October 22, 1877, select the land in question, and at that time it was unoccupied and unimproved. The selection was made with the permission of the Commissioner of the General Land Office, and when it was made the company paid therefor the amount of fees required, and a certificate of the selection was duly issued, but a patent for the same was never issued to the company. This selection remained in full force and unquestioned until May 13,
83 1886, when it was canceled by order of the Commissioner of the General Land Office. The grounds upon which this cancellation was made were that the tract was situated within the limits of the grant to the Union Pacific Railway Company, Kansas division, which antedates the grant to the Missouri, Kansas & Texas Railway Company, and, being in an even-numbered section, was reserved to the United States for disposal at double minimum rates, for the purpose of reimbursing the Government for the lands granted to the senior company. It is also stated in the order that there were filings and homestead entry upon the record and uncanceled at the time of the grant, and, further, that the railway company did not designate any tracts lost to the grant in lieu of which the tract in question was selected. On June 2, 1863, one William M. Walters made a homestead entry upon the land and received his certificate

therefor. He abandoned the land prior to December 3, 1866, and his entry was canceled for abandonment on October 7, 1875. On June 10, 1884, the railway company, claiming to own the land, conveyed the same to Lee Clark, who paid the full purchase price of the same, and afterward, for substantial considerations, it was transferred through several parties until January 7, 1885, when it was acquired by the plaintiff. The grantees subsequent to the defendant each, in turn, went into actual possession of the land, and remained in possession until July 31, 1886, and each grantee assumed and believed that the railway company had a good title to the land. On January 31, 1886, E. M. Cox made a homestead entry upon the land and took forcible possession of the same. He canceled the entry by relinquishment on March 10, 1888, when B. L. Herington homesteaded the land, but his entry was canceled by relinquishment on July 28, 1888. On the last-named date E. M. Cox made a declaratory statement, claiming settlement of the land on July
84 27, 1888, and afterward made final cash proof, and the final certificate was issued to him on July 26, 1889. A patent to the land was issued to Cox on October 15, 1890. When the selection of the land by the railway company was canceled time was given in which to appeal from the order of the Commissioner, but no appeal was ever taken. No notice was given to the defendant or to any of his grantees by the plaintiff of any contest over the land in the United States land office, now were legal proceedings of any kind ever commenced by Cox against the plaintiff to oust or evict him from the possession of the land.

Upon the facts the court found in favor of the defendant, holding that, by reason of the abandonment of the homestead by Walters, the land passed under the grant to the railway company, and that the plaintiff's title to the land, derived from the railway company, had not failed. Judgment was thereupon awarded in favor of the defendant for his costs. The plaintiff excepts, and brings the case here. The opinion was filed April 11, 1896.

J. H. Mahan, for plaintiff in error.

T. N. Sedgwick, for defendant in error.

The opinion of the court was delivered by

JOHNSTON, *J.*:

The right of the plaintiff to recover depends upon whether there has been a failure of the title to the land in question, and which the defendant attempted to convey by a deed containing full covenants. If the railway company and those claiming under it acquired no title to the land, and if it remained public land, subject to pre-emption or homestead entry, then Cox acquired a good title to the land, and the contention of the plaintiff must prevail. The claim that the plaintiff must fail because he did not resist the entry of Cox is without force, if the paramount title was in the United States. 'Where the title to the land in controversy is in the United States and liable to entry and settlement under the provisions of the homestead
85 law, that of itself, is such a hostile assertion of the paramount title as would authorize the purchaser to voluntarily submit

to it.' (K. P. Rly. Co. *v.* Dunmeyer, 19 Kan. 539.) The question, then, is: Did the railway company acquire the land under the grant, and were the steps subsequently taken sufficient to vest it with title thereto? Under the act of Congress, there was granted to the State for the benefit of the railway company 'every alternate section of land or parts thereof, designated by odd numbers, to the extent of five alternate sections per mile on each side of the road, and not exceeding in all 10 sections per mile.' The act contained the provision that if any of the land specifically granted had been sold, reserved, or if the right of pre-emption or homestead settlement had attached to the same, an equal amount of other land might be selected from the public lands nearest to the excepted sections, and within 20 miles from the line of said road, for the purpose of making up such deficiency. (14 U. S. Stat. 289.) The land in question was not a part of the alternate odd-numbered sections specifically granted, but was within the 20-mile limit from which lands might be selected to supply those lost to the grant from sales or other disposition made before the date of the grant. If it had been within the place limits of the grant, the right of the company would have attached when the line of railway was definitely located opposite to it; but the grant of indemnity lands does not attach to any specific tracts until it is known what the deficiency is, and a selection is made to supply the deficiency, as the law requires. The court below seems to have proceeded upon the theory that the homestead entry of Walters, made in 1863, would, if it had been kept alive, have operated to exclude the land from the provisions of the grant; but that, by reason of his abandonment of the homestead, it passed under the grant to the railway company, and because of that fact the
86 plaintiff's title to the land had not failed. Not being within the place limits of the grant, it is immaterial that there was a homestead entry upon the land at the time of the grant or of the definite location. Being within the indemnity limits, it was only important to determine whether it was public land and subject to selection at the time the selection was actually made. If it had been within the place limits, the uncanceled entry of Walters would, under the recent decisions of the Supreme Court of the United States, and notwithstanding the abandonment, have operated to exclude it from the grant. (Railroad Co. *v.* Whitney, 132 U. S. 357; Whitney *v.* Taylor, 158 *id.* 85. See, also, Newhall *v.* Sanger, 92 U. S. 761; K. P. R'l'y Co. *v.* Dunmeyer, 113 *id.* 629; Bardon *v.* Railroad Co. 145 *id.* 535.) So far as the land in controversy is concerned, the legal effect of an abandonment was wholly immaterial, as no title to the land could be acquired by the company until the selection was made, and prior to that time the entry of Walters had been duly canceled.

Although the case was disposed of by the trial court upon an erroneous view, the question remains whether the railway company obtained title to the land by the subsequent selection that was made. It appears to have been made with the permission of the Land Department, in lieu of land lost to the company by reason of the attachment of homestead or pre-emption rights. The fees were paid,

and a certificate of selection was duly issued to the company. The land was within the indemnity limits of the grant, and, if it was subject to be selected by the company as indemnity land, it would seem, from the agreed facts, that the selection was properly made, and that the company was entitled to the land. It appears, however, that the land was in an even-numbered section, within
87 the place limits of the grant to the Union Pacific Railway Company, and, further, that it had been reserved to the United States for a specific purpose, and was therefore not subject to disposal under the general laws relating to the public domain. The granting act of July 26, 1866, under which the land in question was selected, contains a reservation clause excepting from the operation of the act all lands reserved by Congress or other competent authority for the purpose of aiding in any object of internal improvement or other purpose whatever, except for right of way of the railway. Under the Union Pacific grants, the odd-numbered sections within 20 miles of the line of road were granted, and by another provision the even-numbered sections within the limits of the grant were made double minimum lands, and rated at $2.50 per acre, and were only subject to entry under the laws relating to the disposal of such lands. (12 U. S. Stat. 489; 13 *id.* 356; 14 *id.* 79; 15 *id.* 39.) When the even-numbered sections within the place limits of the Union Pacific grant were set apart for the specific purpose named, they were, in fact, reserved by Congress, and in a certain sense segregated from the body of the public lands of the United States. This was the view taken in the case of United States *v.* M. K. & T. R'l'y Co., 141 U. S. 358. It was held, that, as the result of the construction of the railroad aided would be an increase of the market value of the sections remaining to the United States within the limits of the grant, the sections so reserved were excluded from the operation of the grant. 'In order that the Government might get the benefit of such increase of value and thereby reimburse itself to some extent for the land granted, * * * the act of 1863 made special provisions in reference to those reserved sections, and thereby, and for the accomplishment of particular purposes, expressly declared, segregated them from the body of the public
88 lands of the United States.' Until the lands were actually selected and set apart under the direction of the Secretary of the Interior specifically for indemnity purposes, the title thereto did not vest in the company, but remained in the United States and subject to its disposal. Long before the selection was made, the lands in question had been reserved and specifically set apart for a purpose wholly inconsistent with the theory that they might be taken for indemnity. If the company was permitted to select from the double minimum lands, it would thereby receive lands of twice the value of those lost to the company, and in lieu of which the selection was made. The theory upon which indemnity was provided was, that if the lands specifically granted had been disposed of, or the rights of settlers had attached to them, other equivalent lands might be selected in their place. It was certainly not the intention of Congress to enhance the grant by allowing a selection of lands of

twofold the value of those lost by previous disposition or reservation for other purposes. As the land in question had been reserved to the United States for a specific purpose, it was not subject to selection by the railway company, and the Land Department was without authority to transfer the land to the company, by the process of selection, certification, or by patent. No patent, however, was issued to the company, but, upon proceedings which appear to be regular, a final certificate was issued to Cox, and subsequently a patent in due form was issued to him. It therefore appears that there was a complete failure of title, and that the plaintiff is entitled to recover the damages sustained. We cannot ascertain from the agreed facts the amount of damages which should be awarded, and hence judgment cannot be ordered upon the findings.

The judgment will be reversed, and the cause remanded
89 to the district court to try and determine the amount of damages which the plaintiff has sustained. All the justices concurring."

And a mandate was issued by this court April 11, 1896 reversing said judgment of the district court and ordering that the cause be remanded for a trial and determination of the amount of damages which the plaintiff had sustained. Said mandate being in the words and figures following, to wit:

Mandate from Supreme Court.

SUPREME COURT, } ss:
State of Kansas, }

The State of Kansas to the district court within and for the county of Labette, in the State of Kansas, Greeting:

Whereas, in a certain civil action lately pending before you, wherein Monroe D. Herington was plaintiff, and Lee Clark was defendant, a judgment was rendered by you against the said plaintiff on a transcript of which judgment and record said plaintiff prosecuted a petition in error in the supreme court within and for the State of Kansas:

And whereas, at the April session of the January term of said supreme court, A. D. 1896, on consideration of the said petition in error, it was ordered and adjudged by the said supreme court that the judgment of the district court be reversed, and that this cause be remanded for a trial and determination of the amount of damage which the plaintiff has sustained.

You are therefore commanded, that without delay you cause execution to be had of the said judgment of the supreme court, according to law.

Witness my hand, and the seal of the said supreme court affixed thereto, at my office, in the city of Topeka, on the 11th day of April, A. D. 1896.

[SEAL.]

C. J. BROWN,
Clerk Supreme Court.

Endorsed as follows: Monroe D. Herington *vs.* Lee Clark. Mandate from the supreme court. State of Kansas, Labette county, *ss.* Received and filed Sept. 2nd, 1896. E. C. Clark, clerk district court, by Colin Hodge, deputy.

At the February term 1897 of said district court said cause again came on for hearing on the identical pleadings and the identical evidence as on said trial at October term 1891 and shown by proceeding in error No. 8249, but in addition thereto the syllabus, statement, opinion and mandate of this court were offered in evidence as hereinbefore shown, yet, the court again rendered judgment in favor of said Lee Clark. The said Monroe D. Herington prosecuted another proceeding in error to this court which was filed herein on the — day of —— 1897 as No. 10909.

The petition in error, except the exhibits, being as follows, to wit:

In the Supreme Court of the State of Kansas.

MONROE D. HERINGTON, Plaintiff in Error,
vs.
LEE CLARK, Defendant in Error.

Petition in Error.

The said plaintiff in error, Monroe D. Herington, complains of the said defendant in error, Lee Clark, and for his petition in error alleges that in a certain action pending in the district court of Labette county, in the State of Kansas, in which the said Monroe D. Herington was plaintiff and the said Lee Clark was defendant, in which said court the said plaintiff sought to recover from the said defendant the sum of two thousand five hundred dollars (2,500.00) damages on account of the breach of conditions of seizin and warranty in a certain deed made by the said defendant Lee Clark to the grantors of the plaintiff. The said defendant, by the consideration of said court, recovered a judgment against the plaintiff adjudging that there had been no failure of title in said cause and adjudging
91 the said plaintiff to pay the costs therein; which said judgment was rendered in said cause by said district court on the 29th day of October 1891, and on said district court refusing a new trial therein, the plaintiff in error filed his petition in this court and upon consideration thereof said judgment was reversed by this court and upon the agreed statement of facts adjudged that said plaintiff was entitled to recover from the said defendant upon said covenants and remanded said cause to the district court of Labette county to assess the amount of the plaintiff's damages only and for no other purpose; that said judgment of this court was rendered at the April session of this court and at the January term of this court, A. D. 1896; and that said cause again coming on to be tried by the district court pursuant to said mandate, the said court again rendered judgment for the said defendant and against this

plaintiff, and denied to the plaintiff again a new trial of said cause upon his motion.

The record of the proceedings of said court and the evidence therein in a case-made is hereto attached, marked "Exhibit A" and made a part of this petition in error.

And the said plaintiff avers that there is error in the action and proceedings of said court in this.

First. That the said district court of Labette county erred in not limiting the trial of said cause under the mandate of the supreme court to the amount of damages to which the plaintiff was entitled to recover by reason of the breach of warranty assigned in his petition in said cause.

Second. The court erred in considering the other issues in said cause other than the amount of damages to which the plaintiff was entitled to recover, in violation to the directions of this court.

92 Third. That said district court of Labette county erred in finding and holding that the said plaintiff was not entitled to recover anything in said cause against said defendant.

Fourth. That said district court erred in finding for and rendering judgment for the defendant in said cause and against the plaintiff, and in refusing to enter judgment for the plaintiff in said cause for his damages as shown by the agreed statement of facts in said cause and the evidence upon said trial.

Fifth. That said district court erred in denying the plaintiff's motion for a new trial in said cause.

Wherefore, said plaintiff prays that the judgment may be reversed and that he may be restored to all things that he has lost by reason of said judgment and decision.

(Signed) NELSON CASE,
Attorney for Plaintiff in Error.

Issue and service of summons in error is hereby waived and the appearance of the defendant in error is hereby entered in said cause.

(Signed) T. N. SEDGWICK,
Attorney for Defendant in Error.

On December 10, 1898 this court again reversed said judgment of the district court and again remanded the cause to the district court for a determination of the damages to said Monroe D. Herington on such evidence as the parties should see fit to produce. The opinion of this court is truly reported in vol. 55 of the Pac. Rep'r at page 462, and is as follows:

(Supreme Court of Kansas, Dec. 10, 1898.)

HERINGTON
vs.
CLARK.

"*Per Curiam:*

The trial court has evidently misapprehended the meaning of the prior decision of this court in this case, for, on precisely the

same state of facts that was presented to the court before, it has rendered the same judgment which this court reversed. 44 Pac. 624. The misapprehension doubtless arises from the fact that the cause was remanded for the determination of the amount of
93 the plaintiff's recovery, and, the plaintiff having failed to introduce further testimony or make any clearer showing than was then presented, the trial court has held that he was not entitled to any damages. The effect of the decision of this court was that the plaintiff was entitled to substantial damages; but, as the showing in the agreed statement of facts was meager and unsatisfactory, this court, fearing that injustice might be done by directing judgment at that time, saw fit to remand the case for a more full presentation of the facts bearing on the amount of the plaintiff's recovery. In the absence of any special circumstances, the general rule as to the measure of damages is that the plaintiff is entitled to recover the consideration, with interest to the date of the eviction. The statements as to the occupancy of the land are indefinite and unsatisfactory, and there is no showing as to its rental value. It may be that this court might have directed the entry of the judgment on the record presented on the former hearing; and it seems probable from the position now taken by counsel that the trial court has taken the view that this court was unable to determine from the statement of facts that the plaintiff was entitled to recover any sum as substantial damages, and that, having failed to make any further showing, none could be awarded by the trial court. This was a misconception of the decision of this court. The judgment must be reversed, and the cause remanded for the determination of plaintiff's damages, on such evidence as the parties see fit to produce."

On the hearing of said motion to dismiss the said Lee Clark introduced in evidence the following papers and documents, to wit:

"In the District Court of Labette County, Kansas.

MONROE D. HERINGTON, Plaintiff, *vs.* LEE CLARK, Defendant. } Extension of Time in which to Make Case for Supreme Court.

94 For good cause shown, the time heretofore given in which to serve case-made for the supreme court in the above-entitled cause is hereby extended to August 10th, 1899; the time in which the plaintiff shall have to suggest amendments is not changed, except that such time shall not begin until the service of the case-made.

A. H. SKIDMORE,
District Judge.

Endorsed: In the district court of Labette county, Kansas—Monroe D. Herington, plaintiff, *vs.* Lee Clark, defendant—Extension of time to make case—Filed July 14, 1899. John Meyer, clerk district court.

STATE OF KANSAS, } ss:
Labette County, }

I, John Meyer, clerk of the district court within and for the county of Labette in the eleventh judicial district of the State of Kansas, do hereby certify that the above and foregoing is a true, complete and perfect copy of the order of extension of time to make case—filed in the case of Herington *vs.* Clark, No. 4177, as the same remains on file and of record in my office.

Witness my hand and seal of said court this 14th day of May, A. D. 1900.

JOHN MEYER,
Clerk of the District Court, Labette County, Kansas."

"In the District Court of Labette County, Kansas.

MONROE D. HERINGTON, Plaintiff, }
vs.
LEE CLARK, Defendant. }

STATE OF KANSAS, } ss:
County of Labette, }

John Mayer of lawful age, being first duly sworn, upon oath deposes and says that he is the clerk of the district court of Labette county, Kansas; that he has been such clerk for about three years last past: that he was such clerk of the district court in February and May 1899; that he is acquainted with Hon. A. H. Skidmore, the judge of said district court; that he is also acquainted with the case of Monroe D. Herington *vs.* Lee Clark, and was present
95 in court when all the proceedings were had in said case at the February and May 1899 terms of said court, the Hon. A. H. Skidmore presided as district judge, and was the presiding judge before whom the case of Monroe D. Herington *vs.* Lee Clark was heard and tried, and before whom all the proceedings were had in said cause at said February and May terms of said court; that he is the same A. H. Skidmore who allowed, settled and signed the case-made, and at the time of allowing, settling and signing said case-made he was still the duly elected, qualified and acting district judge of the district court of Labette county, Kansas, and the same judge before whom said case of Monroe D. Herington *vs.* Lee Clark was tried at the February and May terms of said court. And further affiant saith not.

JOHN MAYER.

Subscribed and sworn to before me this 31 day of May A. D. 1900.

T. W. CRAIN,
Probate Judge Probate Judge *of Labette County, Kansas.*

My commission expires —.

In the District Court of Labette County, Kansas.

MONROE D. HERINGTON, Plaintiff,
vs.
LEE CLARK, Defendant.
} Extension of Time in which to Make Case for Supreme Court.

Be it remembered, that heretofore to wit, on the 14th day of July 1899, the following proceedings were had and entered upon the journal of this court in the above cause to wit:

For good cause shown, the time heretofore given in which to make and serve case-made for the supreme court in the above-entitled cause is hereby extended to August 10, 1899; the time in which the plaintiff shall have to suggest amendments is not changed, except that such time to suggest amendments shall not begin until
96 the service of the case-made.

A. H. SKIDMORE,
District Judge.

Endorsed as follows: No. 4177—In the district court of Labette county, Kansas,—Monroe D. Herington, plaintiff *vs.* Lee Clark, defendant—Extension of time to make case—Filed July 14, 1899, John Mayer, clerk district court.

STATE OF KANSAS,
Labette County,
} *ss:*

I, John Mayer, clerk of the district court within and for the county of Labette in the eleventh judicial district of the State of Kansas, do hereby certify that the above and foregoing is a true, complete and perfect copy of the order made by court of extension of time to make case-made in the case of Monroe D. Herington *vs.* Lee Clark, No. 4177, as the same remains on file in my office.

Witness my hand and the seal of said court this 2nd day of June A. D. 1900.

[SEAL.]

JOHN MAYER,
Clerk of the District Court, Labette County, Kansas."

And the foregoing is all the evidence that was introduced on said motion to dismiss. But this court overruled and denied said motion to dismiss, to which ruling and decision of the court the said Monroe D. Herington, defendant in error, then and there, duly excepted, and he prays that this his bill of exceptions be allowed and signed at this, the same term of the court at which said motion was heard, and that the same be filed and made a part of the record herein, which is accordingly done.

Witness my hand as chief justice of the said court and for the court on this 27th day of June, 1900 at the January term of said court for said year.

FRANK DOSTER,
Chief Justice.

97 Endorsed: 11637. Lee Clark *vs.* Monroe D. Herington. Bill of exceptions. Filed Jun- 27, 1900. D. A. Valentine, clerk supreme court.

98 And be it further remembered, that afterward, on the 1st day of August, 1900, the same being one of the regular judicial days of the July 1900 term of the supreme court of the State of Kansas, said court being in session at its court-room in the city of Topeka, there being present the Honorable Frank Doster, chief justice, the Honorable William A. Johnston, and the Honorable William R. Smith, associate justices, the following proceeding was had and remains of record, as follows, to wit:—

99 *Journal Entry of Assignment.*

It is ordered that the following cases be assigned for hearing a the October 1900 session of this court:

* * * * * * *

CLARK
vs. } No. 11637.
HERINGTON.

* * * * * * *

100 And be it further remembered, that on the 3rd day of October, 1900, the same being one of the regular judicial days of the July, 1900, term of the supreme court of the State of Kansas, said court being in session at its court-room in the city of Topeka, there being present the Honorable Frank Doster, chief justice; the Honorable William A. Johnston and the Honorable William R. Smith, associate justices, the following proceeding was had and remains of record, as follows, to wit:

101 *Journal Entry of Submission.*

LEE CLARK, Pl'ff in Error,
vs. } 11637.
MONROE D. HERINGTON, Def't in Error.

This cause comes on to be heard on the petition in error and transcript of the record of the district court of Labette county; and thereupon, after oral argument by David Martin for the defendant in error, said cause is submitted on brief of counsel for both parties, and taken under advisement by the court.

102 And be it further remembered, that on the 10th day of November 1900, the same being one of the regular judicial days of the July 1900 term of the supreme court of the State of Kansas, said court being in session at its court-room in the city of Topeka, there being present the Honorable Frank Doster, chief justice; the Honorable William A. Johnston and the Honorable William R. Smith, associate justices, the following proceeding was had and remains of record, as follows, to wit:

103 *Journal Entry of Decision.*

LEE CLARK, Pl'ff in Error,
vs.
MONROE D. HERINGTON, Def't in Error. } 11637.

This cause comes on for decision; and thereupon it is ordered and adjudged that the judgment of the court below be affirmed.

It is further ordered that the plaintiff in error pay the costs of this case in this court taxed at $—, and hereof let execution issue.

104 And also on the said 10th day of November, 1900, there was filed in the office of the clerk of the supreme court of the State of Kansas, the opinion of said court in this cause, which opinion is in words and figures as follows, to wit:—

105 LEE CLARK
v.
MONROE D. HERINGTON. } No. 11637.

Error from Labette county. Affirmed.

Opinion.

Per Curiam: This is the third time this case has been in this court. Herington *v.* Clark, 56 Kan., 644; Same *v.* Same, 55 Pac., 462. Upon both the former hearings we held against the present plaintiff in error, Clark, upon the question of land title involved. He presents to us again the same question and none other. The law having been found against him upon the former hearings, and having been sufficiently declared in the opinions already rendered, the judgment of the court below will be, therefore, affirmed.

A true copy.
Attest:
[SEAL.]

D. A. VALENTINE,
Clerk Supreme Court.

106 And afterward, on the 10th day of December, 1900, there was filed in the office of the clerk of the supreme court of the State of Kansas a petition for writ of error, which, with the endorsements thereon is in the words and figures as follows, to wit:—

107 *Petition for Writ of Error.*

To the Honorable Frank Doster, chief justice of the supreme court of the State of Kansas:

Comes now Lee Clark, by James Hagerman and T. N. Sedgwick, his attorneys, and complains that in the record and proceedings and also in the rendition of a judgment in the suit wherein he, the said Lee Clark, was plaintiff in error and Monroe D. Herington was defendant in error in the supreme court of the State of Kansas, at the

July 1900 term thereof, to wit, November 10th, 1900, a manifest error hath been committed against him in this, to wit:

That in the cause in which such judgment was rendered by the said supreme court of Kansas, the said Lee Clark claimed and contended that under and by virtue of an act of Congress approved July 26th, 1866, entitled "An act granting lands to the State of Kansas to aid in the construction of a Southern branch of the Union Pacific railway and telegraph from Fort Riley, Kansas, to Fort Smith, Arkansas," the Missouri, Kansas & Texas Railway Company had the right to select for indemnity purposes the following-described piece of land, to wit:

The south half of the northwest quarter and the north half of the southwest quarter of section 22, township 15, range 5 east of the sixth principal meridian.

That the selection was made by said railway company. That under and by virtue of said act of Congress it thereby became possessed of a good and indefeasible title to the same, and could sell and convey the same by deed of conveyance. That he, the said Lee Clark, became possessed of the legal and equitable title to said land by virtue of a conveyance to him by said railway company after such selection, and that his deed conveying said land gave good title thereto to his grantee, the said Monroe D. Herington, and that his said grantee was a *bona fide* and innocent purchaser of the title to said land within the intent and meaning of an act of Congress approved March 3rd, 1887, entitled "An act to provide for the adjustment of land grants made by Congress to aid in the construction of railroads and for the forfeiture of unearned lands, and for
108 other purposes," and that as such, the title of his said grantee thereto is fully protected by said act. And the decision of the said supreme court of the State of Kansas was against the validity of said claims of said plaintiff in error, all of which fully appears from a transcript of the record and judgment in which cause herewith submitted.

Wherefore, said Lee Clark, plaintiff in error, prays the allowance of a writ of error and such other process as may cause the same to be corrected by the Supreme Court of the United States.

JAMES HAGERMAN AND
T. N. SEDGWICK,
Attorneys for Plaintiff in Error.

109 [Endorsed:] 11637 Lee Clark *vs.* Monroe D. Herington Petition for a writ of error Filed Dec. 10 1900 D. A. Valentine clerk supreme court.

110 And also on the same day there was filed in the office of the clerk of the supreme court of the State of Kansas, a writ of error which with the allowance thereof and the endorsements thereon, is in the words and figures as follows, to wit:

111 *Writ of Error.*

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the judges of the supreme court of the State of Kansas, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court of the State of Kansas, before you or some of you, being the highest court of law or equity of the said State in which a decision could be had in the suit between Lee Clark, plaintiff in error, and Monroe D. Herington, defendant in error, wherein the claim was made by the said Lee Clark, plaintiff in error, that under and by virtue of an act of Congress, approved July 26th, 1866, entitled "An act granting lands to the State of Kansas to aid in the construction of a Southern branch of the Union Pacific railway and telegraph from Fort Riley, Kansas, to Fort Smith, Arkansas," the Missouri, Kansas & Texas Railway Company had the right to select for indemnity purposes the following-described piece of land, to wit:

The south half of the northwest quarter and the north half of the southwest quarter of section 22, township 15, range 5 east of the sixth principal meridian.

That the selection was made by the said railway company. That under and by virtue of said act of Congress it thereby became possessed of a good and indefeasible title to the same, and could sell and convey the same by deed of conveyance. That he, the said Lee Clark, became possessed of the legal and equitable title to said land by virtue of a conveyance to him by said railway company after such selection, and that his deed conveying said land gave good title thereto to his grantee, the said Monroe D. Herington, and that his said grantee was a *bona fide* and innocent purchaser of the title to said land within the intent and meaning of an act of Congress, approved March 3rd, 1887, entitled "An act to provide for the adjustment of land grants made by Congress to aid in the construction of railroads and for the forfeiture of unearned lands, and for other purposes," and that as such, the title of his said grantee
112 thereto is fully protected by said act, and the decision was against the validity of such claim of said plaintiff in error; a manifest error hath happened to the great damage of the said Lee Clark, plaintiff in error, as by his complaint appears.

We being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court, at Washington, within thirty days from the date hereof, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right

and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, this 10 day of December, in the year of our Lord one thousand nine hundred.

{ The Seal of the Circuit Court of the United States, District of Kansas, 1862. }

GEO. F. SHARITT,
Clerk of the United States Circuit Court for the District of Kansas.

Allowed by—
FRANK DOSTER,
Chief Justice of the Supreme Court of Kansas.

113 [Endorsed:] 11637 Lee Clark *vs.* Monroe D. Herington Writ of error Filed Dec. 10 1900 D. A. Valentine clerk supreme court

114 And also on the same day there was filed in the office of the clerk of the supreme court of the State of Kansas, a supersedeas bond which, with the approval thereof and the endorsements thereon is in words and figures as follows, to wit:

115 In the Supreme Court of the State of Kansas.

LEE CLARK, Plaintiff in Error,
vs.
MONROE D. HERINGTON, Defendant in Error. } No. 11637.

Supersedeas Bond.

Know all men by these presents, that we, Lee Clark, as principal, and E. B. Stevens as his surety, both of Parsons, Labette county, Kansas, are held and firmly bound unto the above-named Monroe D. Herington in the sum of six thousand ($6,000) dollars, for the payment of which well and truly to be made, we bind ourselves and each of us, and all our heirs, executors, administrators and assigns, jointly and severally firmly by these presents. The conditions of the above bond are that whereas the above-named Lee Clark as plaintiff in error, has prosecuted a writ of error from the Supreme Court of the United States to reverse the judgment of the supreme court of Kansas in the above-entitled case:

Now, therefore, the conditions of this obligation are such that if the above-named Lee Clark shall prosecute his said writ of error to effect and answer all damages and costs, if he shall fail to make good his plea, then this obligation shall be void; otherwise the same shall be and remain in full force and effect.

Witness our hands this 8th day of December, 1900.

LEE CLARK,
By T. N. S.
E. B. STEVENS.

116 STATE OF KANSAS, } ss:
County of Labette, }

E. B. Stevens, of lawful age, being first duly sworn upon oath deposes and says that he is a resident of Labette county, Kansas and is the E. B. Stevens who signed the above bond as surety for Lee Clark. And affiant further says that he is worth the sum of six thousand dollars over and above all debts, liabilities and exemptions allowed by law. And further affiant saith not.

E. B. STEVENS.

Subscribed in my presence and sworn to before me this 8th day of December, A. D. 1900.

[Notary Public Seal.]

OTTA L. CALDWELL,
Notary Public.

My commission expires January 15th, 1901.

The above bond accepted and approved by me this 10th day of December, A. D. 1900.

FRANK DOSTER,
Chief Justice of the State of Kansas.

(Endorsed on back:) 11637. In the supreme court of the State of Kansas. Lee Clark, pl'ff in error, *vs.* Monroe D. Herington, def't in error. Supersedeas bond. Filed Dec. 10, 1900. D. A. Valentine, clerk supreme court.

117 And also on the same day there was filed in the office of the clerk of the supreme court of the State of Kansas, a bond for costs, which, with the approval thereof and the endorsements thereon is in words and figures as follows, to wit:

118 In the Supreme Court of the State of Kansas.

LEE CLARK, Plaintiff in Error,
vs.
MONROE D. HERINGTON, Defendant in Error. } No. 11637.

Bond for Costs.

Know all men by these presents: That we, Lee Clark as principal, and E. B. Stevens as his surety, both of the city of Parsons, Labette county, Kansas, are held and firmly bound unto the above-named Monroe D. Herington in the sum of five hundred ($500.) dollars, to be paid to him the said Monroe D. Herington, his heirs, executors, administrators and assigns, for which payment well and truly to be made, we bind ourselves jointly and severally, and our heirs, executors, administrators and assigns, firmly by these presents, upon the following conditions, to wit:

Whereas the above-named Lee Clark has prosecuted a writ of error in the above-entitled cause in the Supreme Court of the

United States to reverse a judgment rendered against him in the above-entitled cause by the supreme court of the State of Kansas:

Now, therefore, the conditions of this obligation are such that if the said Lee Clark shall prosecute his said writ of error and answer all costs, if he shall fail to make good his plea, then this obligation shall be null and void; otherwise to be and remain in full force and effect.

LEE CLARK,
By T. N. S.
E. B. STEVENS.

The above bond approved by me this 10 day of December, 1900.

FRANK DOSTER,
Chief Justice of the Supreme Court of Kansas.

119 [Endorsed:] 11637 In the supreme court of the State of Kansas. Lee Clark, pl'ff in error, *vs.* Monroe D. Herington, def't in error. Bond for costs. Filed Dec. 10 1900 D. A. Valentine clerk supreme court.

120 And afterwards, on the 18th day of December, 1900, there was filed in the office of the clerk of the supreme court of the State of Kansas, a citation, together with an acknowledgement of the service of the same, which, with the endorsements thereon is in the words and figures as follows, to wit:

121 UNITED STATES OF AMERICA, *ss:*

To Monroe D. Herington:

You are hereby cited and admonished to be and appear at the Supreme Court of the United States, to be held at the city of Washington, within thirty days from the date hereof, pursuant to a writ of error, filed in the office of the clerk of the supreme court of the State of Kansas, in a cause wherein Lee Clark is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment in said writ of error should not be corrected, and why speedy justice should not be done to the plaintiff in this behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, this 10th day of December, 1900.

FRANK DOSTER,
Chief Justice of the Supreme Court of the State of Kansas.

Service of the above citation acknowledged this 14th day of December, 1900, but it is not admitted that error lies herein, but on the contrary it is claimed that this proceeding in error is too late.

DAVID MARTIN,
Attorney for Monroe D. Herington, Named as Defendant in Error.

122 [Endorsed:] 11637. Lee Clark *vs.* Monroe D. Herington Citation Filed Dec. 18 1900 D. A. Valentine clerk supreme court.

123 In the Supreme Court of the State of Kansas.

LEE CLARK, Pl'ff in Error,
vs.
MONROE D. HERINGTON, Def't in Error. } No. 11637.

I, D. A. Valentine, clerk of the supreme court of the State of Kansas, do hereby certify that the above and foregoing is a full, true, correct and complete transcript of all pleadings and papers filed and all proceedings had in the above-entitled cause, as the same now remain on file and of record in my office.

Witness, my hand and the seal of the supreme court of the State of Kansas, hereto affixed at my office in Topeka, this 21st day of December, A. D. 1900.

Seal Supreme Court, State of Kansas.

D. A. VALENTINE,
Clerk of the Supreme Court of the State of Kansas.

124 In the Supreme Court of the State of Kansas.

LEE CLARK, Pl'ff in Error,
vs.
MONROE D. HERINGTON, Def't in Error. } No. 11637.

Pursuant to a writ of error issued out of the United States circuit court for the district of Kansas, on the 10th day of December, 1900, and directed to the supreme court of the State of Kansas, and in obedience to the command thereof, I, D. A. Valentine, clerk of the supreme court of the State of Kansas, do herewith transmit to the Supreme Court of the United States a duly certified transcript of the record, and proceedings of this court, in the within-entitled cause, with all things concerning the same.

Witness, my hand and the seal of the supreme court of the State of Kansas, hereto affixed at my office in Topeka, this 21st day of December, 1900.

Seal Supreme Court, State of Kansas.

D. A. VALENTINE,
Clerk of the Supreme Court of the State of Kansas.

Endorsed on cover: File No. 18,015. Kansas supreme court. Term No. 223. Lee Clark, plaintiff in error, *vs.* Monroe D. Herington. Filed January 9th, 1901.

Office Supreme Court U. S.
FILED
MAR 10 1902
JAMES H. MCKENNEY,

No. 223.

Brf. of Hagerman & Sedgwick

Bryson for P. C.

IN THE

Supreme Court of the United States,

OCTOBER TERM, 1901.

Filed Mar. 10, 1902.

No. 223.

LEE CLARK, PLAINTIFF IN ERROR.

against

MONROE D. HERINGTON, DEFENDANT IN ERROR.

IN ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS.

BRIEF OF PLAINTIFF IN ERROR.

JAMES HAGERMAN and
T. N. SEDGWICK,
Attorneys for Plaintiff in Error.

J. M. BRYSON,
Of Counsel,

The Foley Railway Printing Company, Parsons, Kansas.

IN THE

Supreme Court of the United States,

OCTOBER TERM, 1901.

No. 223.

LEE CLARK, PLAINTIFF IN ERROR.

against

MONROE D. HERINGTON, DEFENDANT IN ERROR.

IN ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS.

Statement.

This case was commenced in the district court of Labette county, Kansas, by the defendant in error (plaintiff below,) against the plaintiff in error (defendant below) to recover damages in the sum of $2500 for breach of warranty in the sale of land described as the S. ½ N. W. ¼ and N. ½ S. W. ¼, Sec. 22, Tp. 15, Range 5,

East of the 6th P. M. It was tried in that court and judgment rendered in favor of Clark, the defendant. The plaintiff below took the case to the supreme court of the state on petition in error, and it was by that court reversed and remanded for a new trial. (Herington v. Clark, 56 Kas. 644.)

It was again tried in the district court, where Clerk again prevailed, and again Herington took the case to the supreme court, where it was again reversed and remanded for a new trial. (Herington v. Clark, 60 Kas. 855; s. c. 55 Pac. Rep. 642.)

On the third trial of the case in the district court, judgment was rendered against Clark, and from this judgment Clark prosecuted error to the supreme court, where the judgment was affirmed. He then obtained a writ of error in the case from this court to the supreme court of Kansas.

The land is located in Morris county, and within the indemnity limits of the grant of July 26, 1866, to the state of Kansas, to aid in the construction of a railroad and telegraph line from Fort Riley, Kansas, to Ft. Smith, Arkansas. (14 Stat. at Large, 289; also App. H. to this brief.) It is claimed by the defendant in error that the land is also within the limits of the grant to the Union Pacific railroad company of July 1, 1862, (12 Stat. at Large, 489; also App. A.) and the act amendatory thereof of July 2, 1864. (13 Stat. at Large, 356; also App. B.) But there is nothing in the record to show this fact, except a reference to it in commissioner's letter "F," dated May 13, 1866, which reads as follows: (R. 20.)

"F"

"DEPARTMENT OF THE INTERIOR.
GENERAL LAND OFFICE.
WASHINGTON, D. C. May 13, 1886.

REGISTER & RECEIVER,
Salina, Kansas.

GENTLEMEN:

I have considered the application of E. M. Cox to make a homestead entry for the south half northwest quarter and the north half southwest quarter section 22, tp. 15 S. R. 5 E. His application was presented Sept. 7, 1885, but was rejected by you the same day for the reason that the land was withdrawn for the Mo. Kan. & Texas Ry. Co.

The land is situated in the indemnity limits of the grant to said company, and the letter of March 19, 1867, directing a withdrawal of lands for the benefit of the same was received at the local office April 6, 1867.

The records of this office show that Wm. M. Walter filed preemption D. S. No. 702 for the northwest quarter of the section July 22nd, 1861, alleging settlement the 20th of the same month. He filed D. S. No. 1109 for the tracts in question June 1, 1863, alleging settlement May 2, 1863. He made homestead entry No. 237 for the same tracts June 2, 1863. This entry was cancelled Oct. 7, 1875, for non-completion within seven years from its date. The company selected the tracts Oct. 22nd, 1877 under the act of July 26, 1866, but patent has not issued. The tracts are situated in the limits of the grant to the Union Pacific Ry. Co. Kansas division, which antedates the grant to the former company and being in an even-numbered section were reserved to the United States for disposal at double minimum rates for the purpose of reimbursing the Government for the lands granted the senior company.

Moreover, the filings and homestead entry of Walters were all made prior to the former grant, and his entry was not canceled until after the withdrawal therefor, while his filings remain of record to the present time.

The company did not designate any tracts lost to the grant for which the tracts in question were selected. For the foregoing reasons it is held that the tracts

were excluded from the operation of the grant of the Mo. Kan. & Texas Ry. Co. The selection of the same by the company is therefore held for cancellation subject to appeal within sixty days. Should this decision become final, the application of Mr. Cox will be allowed. The resident attorneys for the company will be notified from this office.

Very respectfully,
S. M. STOCKSLAGER,
Acting Commissioner."

On June 2, 1863, one Wm. M. Walters made homestead entry on the land and received his certificate therefor. On October 7, 1875, his entry was cancelled for abandonment by commissioner's letter "C," which reads as follows: (R. 19)

"C."

"DEPARTMENT OF THE INTERIOR.
GENERAL LAND OFFICE.
WASHINGTON, D. C., Oct. 7, 1875.

REGISTER & RECEIVER,
Salina, Kansas.

GENTLEMEN:

Referring to your letter of Sept. 28, 1875, in which you state that the following named claimant under the homestead law has permitted the period of seven years allowed by law for making the required proof of settlement and cultivation to expire without making such proof, that he has been notified by you in accordance with my circular of December 20, 1873, and that he has failed to show cause why his claim should not be declared forfeited and his entry cancelled.

I have to state that as the party has failed to comply with the requirements of the law, his entry has this day been cancelled on our files and records. You will, therefore, note the cancellation on your records and thereafter promptly advise us of the fact. The case referred to in the foregoing as cancelled is the following, viz: Homestead entry No. 237 by William M. Walter, made at Junction City, June 2nd, 1863, for the

south half northwest quarter and north half southwest quarter of section 22, 15, 5 east.

Very respectfully,

S. S. BURDETT.

Commissioner."

The abandonment, as shown by the following affidavit of Walters, was on April 1, 1865. (R. 21.)

"STATE OF KANSAS, } ss.
COUNTY OF MORRIS. }

On this 15th day of December, A. D. 1876, before me a notary public in and for said county and state, personally appeared Wm. M. Walters, of lawful age, to me well known, who upon his oath says: I am the identical Wm. M. Walters that made homestead entry No. 237, June 2, 1863, at the U. S. land office on the south half of the northwest quarter and the north half of the southwest quarter of section 22, township 15; range 5, situated in the Salina land district, Kansas; that I settled on said land in 1862, broke out about twenty-five acres, built a small house, fenced the land broken, and continued to cultivate the same and reside thereon up to the first of April, 1865, when I abandoned the land, moved the house and fence away, and have since never returned to improve or claim the same, and I now voluntarily relinquish to the United States any claim I may have thereto by reason of said homestead entry, and authorize the cancellation of the same.

WM M. WALTERS.

Subscribed and sworn to before me.

In testimony whereof, I have hereunto subscribed my name and affixed my official seal on the day and year last above written.

(SEAL.) E. S. BERTRAM.

Notary Public."

The land remained vacant and unoccupied from April, 1865 until September 6, 1884, when possession thereof was taken by W. E. Birchmore, grantee of plaintiff in error Clark. (Par. 8, agreed statement of facts, R. 18.)

The land was selected by the Missouri, Kansas & Texas Railway Company on October 22, 1877, as indemnity for land lost in the place limits of its grant, in accordance with commissioner's letter "F," reading as follows: (Par. 7, R. 16.)

"F."

"DEPARTMENT OF THE INTERIOR.
GENERAL LAND OFFICE.
WASHINGTON, D. C. January 13, 1877.

REGISTER & RECEIVER,
Salina, Kansas.

GENTLEMEN:

I have examined the case of homestead entry No. 237 made June 2, 1863 by William M. Walters for the south half northwest quarter and north half southwest quarter section 22, 15 S. R 5 E. which entry was cancelled October 7, 1875 for abandonment. The tract is within the indemnity limits of the grant made by the act of July 26, 1866 to the Missouri, Kansas and Texas Railway Company, the right of which attached December 3, 1866, the date of filing map of definite location of the road. This was long subsequent to the abandonment by Walter of his homestead claim as shown by his affidavit dated December 15, 1876, and as no other claim for these tracts appears of record in this office, the same inures to the grant and the Missouri, Kansas & Texas railway company will be permitted to select the same.

Very respectfully,
J. A. WILLIAMSON,
Commissioner."

On June 10, 1884, it was sold by said railway company to I. N. McCreery of Parsons, Kansas, who, on the same day, assigned his contract of sale with the company to plaintiff in error Clark. (Par. 11, R. 17.) Clark paid the full purchase price for said land, and on September 5, 1884 received from the railway company

its warranty deed for the same. (Par. 12, R. 17.) On September 6, 1884, Clark sold it to W. E. Birchmore, who, on January, 15, 1885, sold it to Orlando C. Price. Price and wife, on January 7, 1885, sold it to Monroe D. Herington defendant in error in this case. (Par. 13, 14 & 15, R. 17.)

Each of these grantees, except Clark, as he became the owner of the land, entered into the actual possession of the same, and continued in possession while he remained the owner of it. Possession was held by the grantees of Clark from September 6, 1884 to July 31, 1886. On the latter date, one E. M. Cox made homestead entry on said land, but cancelled same on March 10, 1888. At the time of making said homestead entry, he took forcible possession of the land. On July 28, 1888, said Cox made declaratory statement claiming settlement on the land on the 27th. He afterwards made final payment, and a certificate was issued to him on July 26, 1889. No patent was ever issued to the Missouri, Kansas & Texas railway company for the land.

The Pleadings.

The pleadings consist of the petition of the plaintiff and an amendment thereto, the answer of the defendant and the plaintiff's reply. In the petition the plaintiff alleges the conveyance of the land by the railway company to Clark, and then sets out the conveyances in the chain of title from Clark down to and including the deed to himself. Copies of these several conveyances are attached to his petition for reference. He

alleges that Clark claimed title to the land under and by virtue of the grant of the United States to the state of Kansas for the use of the Missouri, Kansas & Texas railway company, and a deed from the company. That it had been determined by the authority of the United States that the land was not within the terms of the grant, but was subject to homestead entry under the laws of congress. That possession was in him and his grantors until ousted by a homestead claimant. That one James Cox settled upon the land and dispossessed him therefrom, and that Cox lawfully holds the same and the possession thereof. That at the time of the deed from Clark to Birchmore, Clark had no title whatever to the land, but that the title was in the United States. He further alleges that Clark has not defended or warranted the title to the land, as agreed, and that therefore he has been damaged in the sum of $2500.

In his amendment to the petition, he avers that when Clark sold the land to Birchmore, Birchmore gave Clark two promissory notes of $800 each, and a mortgage upon the land, to secure the payment of the notes; that after the land was conveyed to the plaintiff, he paid the notes and the interest thereon; that at the time he paid the notes, he believed he had a good title to the land. (R. 2 to 9 inc.)

The answer of defendant Clark consists first, of a general denial; second, that the Union Pacific railway, southern branch, was, on September 25, 1865 incorporated under the general laws of the state of Kansas providing for the incorporation and regulation of railroads. That on February 3, 1870 its name was changed

to the Missouri, Kansas & Texas railway company, under which name it has since been known. That congress on July 26, 1866, passed an act granting lands to the state of Kansas to aid in the construction of a southern branch of the Union Pacific railway and telegraph from Ft. Riley, Kansas to Ft. Smith, Arkansas. That on December 3, 1867, the Union Pacific railway, southern branch, filed with the Secretary of the Interior its map of definite location of the line of its road. That the terms, conditions and impositions of said act of congress of July 26, 1866, were duly accepted in writing by the company within one year after the passage of said act, in compliance with section 7 thereof. That the land described in plaintiff's petition is within 20 miles of the line of the located road and within 20 miles of the line of road as actually constructed through Morris county, Kansas, where the land is located. That on July 2, 1863, Wm. M. Walters made homestead entry upon said land, and that on October 7, 1875, his entry was cancelled by order of the commissioner of the general land office, because of his failure to comply with the law in regard to making improvements thereon, and because he had long prior to 1875 abandoned the land. That on October 22, 1877, the M., K. & T. railway company selected said land in lieu of land lost to it within the place limits of its grant. That such selection was in compliance with commissioner's letter "F." dated January 13, 1877, a certified copy of which, marked "A," is attached to the answer. That a copy of the selection made by the railway company, duly certified, is marked "B" and attached to the answer. That on June 10, 1884, the railway company sold the

land to one I. N. McCreery of Parsons, Kansas, and executed and delivered to him its contracts of sale. That McCreery assigned said contracts on the same day to plaintiff in error, Lee Clark. That Clark paid the full purchase price to the railway company and received its warranty deed for the land. That Clark afterwards and on September 6, 1884, sold the land to Wm. E. Birchmore. On January 15, 1885 Birchmore conveyed the land to Price. Price and wife, on the same day, conveyed it to defendant in error, Monroe D. Herington. That each and all of these conveyances were made in good faith and in full reliance upon the validity of the selection of the railway company, and upon the title which it thereby secured. That after the defendant in error became the owner of the land, and on May 13, 1886, the commissioner of the general land office attempted to cancel the selection of the M., K. & T. railway company. That the commissioner could not, for want of power, cancel said selection after the conveyance of the land by the railway company. (R. 9 to 15 inc.)

The reply of the plaintiff to the answer of defendant consists first of a general denial of all the allegations of the answer; and second, an assertion that the title never passed from the government to the railway company, and therefore the railway company conveyed no title to Clark. (R. 15.)

The case was tried upon an agreed statement of facts, of which the following is a copy, to-wit:

Agreed Statement of Facts.

It is hereby stipulated by and between the plaintiff and defendant in the above entitled cause that the same shall be tried to the court without a jury, upon the following agreed statement of facts, which are hereby agreed upon and admitted to be true, and such other competent testimony as either party may offer on the trial of this cause:

1. That the Union Pacific railway company, southern branch, was a corporation duly and legally organized and incorporated under and by virtue of the laws of the State of Kansas, and is the same corporation mentioned and described in the Acts of Congress of the United States entitled, "An act granting land to the State of Kansas to aid in the construction of a southern branch of the Union Pacific railway and telegraph from Fort Riley, Kansas, to Fort Smith, Arkansas," approved July 26, 1866.

2. That afterwards, to-wit, on the 31st day of March, 1870, the said Union Pacific railway company, southern branch, was in accordance with the law changed in name to that of the Missouri, Kansas & Texas railway company, which change of name was legally made, and by which latter name the said Union Pacific railway company, southern branch, is, and ever since said 31st day of March, 1870, has been known, and thereupon the said Missouri, Kansas & Texas railway company became, was and still is by competent authority the legal and equitable successor and owner of all the benefits, rights and franchises contained in and provided by said act of congress; and all the rights, property, grants, franchises of whatsoever name or character theretofore held, owned and enjoyed by the said Union Pacific railway company, southern branch, to the full and same extent the latter company did own, hold and enjoy, or could own, hold and enjoy either under the said act of congress, or any other act of congress, or any act of the legislature of the State of Kansas.

3. That the line and route of said railway company was definitely fixed and located through the county of Morris, in the State of Kansas, to the southern boundary line of said state, and opposite and parallel to the land described in the petition of the plaintiff herein, and maps thereof filed with the Secretary of the Interior on the 7th day of January, 1868, as contemplated and provided in said act of congress of July 26, 1866.

4. That in order to secure to the said railway company the full quantity of land granted by said acts of congress, the said land described in plaintiff's petition, together with other lands, was withdrawn from market and from the operation of the homestead and pre-emption laws of the United States by the Secretary of the Interior, as contemplated and provided in said act of congress on the 6th day of April, 1867, which was the date the register and receiver of the U. S. land office at Saline, Kansas received notice of such withdrawal.

5. That said railway corporation duly accepted the provisions and benefits of the said act of congress on the 6th day of December, 1866, and in pursuance thereof did proceed with the construction and completion of its said railway, and on the 6th day of June, 1870 had constructed and completed its railway as contemplated and provided, from Fort Riley as aforesaid to the south boundary line of the state of Kansas.

6. That the land described in said plaintiff's petition is situated within the indemnity limits of the grant to said railway corporation as provided by said act of congress, and is within twenty miles from the line and route of said railway so definitely fixed, located and constructed as aforesaid.

7. That in lieu of an equal amount of land lost to said railway company by reason of the attachment of homestead or pre-emption right thereto, as provided by said act of congress approved July 26, 1866, when the line of said railway company was definitely located the said railway company under the proper rules of the Department of the Interior, did, on October 22,

1877, cause to be selected, and did select, the tracts of land described in the plaintiff's petition, herein which selection was in accordance with letter "F" of the Commissioner of the General Land Office, dated January 13, 1877, a copy of which letter is hereto attached for reference.

8. That at the time said land was so selected by the said railway company as aforesaid, it was unimproved and without actual occupation until after September 5, 1884.

9. That on June 2, 1863 one Wm. M. Walters made homestead entry No. 237 of the land described in plaintiff's petition and received his certificate therefor; and on October 7, 1875 his said entry was cancelled for abandonment by Commissoner's letter "C" of said date, a copy of which said letter is hereto attached for reference.

10. That said Wm. M. Walters abandoned said land prior to December 3, 1866, as appears by his affidavit dated December 15, 1876, a copy of which affidavit is hereto attached for reference.

11 That on the 10th day of June, 1884, the said Missouri, Kansas & Texas railway company sold said land to I. N. McCreery of Parsons, Kansas, and gave him written contracts therefor, which he, the said I. N. McCreery, on the same day assigned to the defendant herein, Lee Clark.

12. That the said defendant, Lee Clark, paid the full purchase price of said land to said railway company and on September 5, 1884, received from the said railway company a warranty deed for the same.

13. That on September 6, 1884, said defendant Lee Clark and Helen Clark, his wife, for the consideration of $1,600.00 sold said land to one Wm. E. Birchmore and conveyed the same to him by warranty deed as shown in plaintiff's petition; and the said Wm. E. Birchmore thereupon took possession of the said land and enclosed the same with fence together with other lands. And of the consideration named in said deed of said Clark and wife to said Birchmore, he the said

Birchmore, paid the sum of $600.00 cash, and gave to said Clark a mortgage of $1,000.00 upon said land; and thereafter and upon the 25th day of November, 1885, the plaintiff in this action paid said sum of $1,000.00 and $30.00 interest thereon to the defendant in satisfaction of said purchase-money mortgage.

14. That on January 15, 1885, the said Wm. E. Birchmore for a valuable consideration to him in hand paid by one Orlando C. Price, sold and by his deed of quitclaim (without covenants of bargain and sale or warranty) conveyed said land to said Price, as alleged in plaintiff's petition.

15. That on the 7th day of January, 1885, the said Orlando C. Price and Minnie J. Price, his wife, for a valuable consideration, sold and conveyed said land to the plaintiff, Monroe D. Herrington by their warranty deed, as shown by exhibit "C" attached to plaintiff's petition.

16. That the several grantees subsequent to the defendant each in turn went into the actual possession of said land and remained in possession thereof until July 31, 1886.

17. That on July 31, 1886, one E. M. Cox made homestead entry No. 24132 for said land, which he afterwards cancelled by relinquishment March 10, 1888 That at the time of making said homestead entry he took actual and forcible possession of the land.

18. That on March 10, 1888, one Byron L. Herrington made homestead entry No. 24381 for said land, which entry he afterwards cancelled by relinquishment on July 28, 1888.

19. That on July 28, 1888, one E. M. Cox made declaratory statement No. 8666 claiming settlement on the said land on July 27, 1888, and afterwards made final cash proof, and final certificate No. 5472 issued to him on July 26, 1889.

20. That said Lee Clark and each subsequent grantee to the defendant herein at the time of his purchase assumed and believed the M., K. & T. railway company had a good title to the land.

21. That on July 21, 1886, the said selection of the said land by said Missouri, Kansas & Texas railway company was cancelled by order of Commissioner of the General Land Office contained in his letter "F" dated May 13, 1886, copy of which is hereto attached for reference; of which said order of cancellation due notice was given the said railway company and time given it in which to appeal. No appeal was ever taken by said company.

22. That no notice was ever given to the said defendant Lee Clark, or any of his grantees by the plaintiff of any contest over said land in the U. S land office.

23. That no legal proceedings of any kind were ever commenced by said E. M. Cox against the plaintiff to oust or evict him from the possession of said land.

24. That upon the selection of said land by said Missouri, Kansas & Texas railway company on October 22nd, 1877, the amount of the fees therefor was duly paid by said railway company, and a certificate of said selection was duly issued to it.

25. That said selection remained in full force and unquestioned by either government or any one else from said October 22, 1877 to May 13, 1886, when the same was ordered cancelled by Commissioner's letter "F" dated May 13, 1886, as appears in statement 21.

26. That the plaintiff is the assignee of the said Wm. E. Birchmore of all his rights under the deed of the defendant to the said Wm. E. Birchmore, including any breach of the covenants therein contained.

27. That the only possession ever had under any of the conveyances named herein by any of the grantees of the said defendant was by fencing said land and using the same for pasturing cattle.

JNO. H. MAHAN,
Attorney for Plaintiff.

T. N. SEDGWICK,
Attorney for Defendant.

For convenient reference, we have set out in an appendix the various acts of congress referred to in the above statement of facts and in the following brief, to-wit: Acts of July 1, 1862, July 2, 1864, July 3, 1866, March 6, 1868, March 3, 1887, March 3, 1891, March 2, 1896 and July 26, 1866.

Specification of Errors.

1 The supreme court of the state of Kansas erred in affirming the judgment of the district court of Labette county, Kansas, rendered by it in favor of the defendant in error and against the plaintiff in error.

2. The said supreme court erred in refusing to reverse the said judgment of the said district court.

3. The said supreme court erred in holding and deciding that the selection by the railway company of the land described in plaintiff's petition, could be set aside after the conveyance thereof by the said railway company.

4. The said supreme court erred in holding and deciding that the land described in plaintiff's petition was not subject to selection as indemnity land by said railway company, under the act of July 26, 1866.

5. The said supreme court erred in holding and deciding that the defendant in error did not have a good title to the land described in the petition of the plaintiff.

6. The said supreme court erred in holding and deciding that the attempted homestead entry made by

Cox of the land described in plaintiff's petition, was an eviction and ouster of the defendant in error therefrom by one holding a superior title thereto.

7. The said supreme court erred in holding and deciding that the land department of the United States had jurisdiction to cancel and set aside the selection made by the railway company of the land described in plaintiff's petition, after the conveyance thereof by said railway company.

8. The said supreme court erred in holding and deciding that the land described in plaintiff's petition was within the limits of the grant to the Union Pacific railway company of July 1, 1862, and the act amendatory thereof of July 2, 1864, and for that reason excepted from the operation of the grant of July 26, 1866.

9. The said supreme court erred in holding and deciding that the agreed statement of facts shows a breach of warranty of any of the covenants of the deed given by Clark to Birchmore.

ARGUMENT.

I.

The Selection by the Railway Company, in Lieu of Lands Lost Within the Place Limits of its Grant, of a Piece of Land Within the Indemnity Limits, Which at the Time of Such Selection is Free from Conflict, When Approved by the Secretary of the Interior, Operates to Convey the Title to it as Effectively as Would A Patent Issued to it Therefor.

The selection by the railway company was conformable to the rules of the department. (See commissioner's letter "F," dated January 13, 1877, page 19 of the record.) There is no claim of a want of power or authority in the land department to dispose of the land selected by the railway company. If it was public land, the department had entire control of it. At the time of its selection by the railway company it was certainly public land under the definition of public land heretofore given by this court.

In the case of Leavenworth etc. R. R. Co. v. U. S., 2 Otto, 733, which involved the question of the right of the L. L. & G. to a portion of the Osage diminished reserve, under and by virtue of the terms of the grant of March 3, 1863, (12 Stat. at Large, 772) this court said, with reference to such lands as passed to the company by the terms of its grant:

"Since the land system was inaugurated, it has been the settled policy of the Government to sell the

public lands at a small cost to individuals, and for the last twenty-five years to grant them to States in large tracts to aid in various works of internal improvement. But these grants have always been recognized as attaching only to so much of the public domain as was subject to sale or other disposal, although the roads of many subsidized companies pass through Indian reservations.

And such grants could be treated in no other way, for Congress cannot be supposed to have thereby intended to include lands previously appropriated to another purpose, unless there be an express declaration to that effect. A special exception of them was not necessary, because the policy which dictated the grants confined them to lands which Congress could rightfully bestow, without disturbing existing relations and producing vexations conflicts. The legislation which reserved them for any purpose excluded them from disposal in the manner that the public lands are usually disposed of, and this Act discloses no intention to change the long continued practice with respect to lands set apart for the use of the Government or of the Indians. As the attempted transfer of any part of an Indian reservation, secured by treaty would also involve a gross breach of the public faith, the presumption is conclusive that Congress never meant to grant it."

In the case of Newhall v. Sanger 92 U. S., 761, this court more specifically defined the term "public lands" as follows:

"The words 'public lands' are habitually used in our legislation to describe such as are subject to sale or other disposal under general laws. That they were so employed in this instance is evident from the fact that to them alone could, on the location of the road, the order withdrawing lands from pre-emption, private entry and sale, apply."

Within the definition of public lands given by this court in the two cases above cited, the land in controversy at the time it was selected by the M. K. & T. for indemnity purposes was public land. It was wholly under the control of the land department of the United

States. That department was charged with the duty of determining what lands passed to the M., K. & T. Ry. Co. under its grant of July 26, 1866, and it did determine that the land in controversy was subject to selection by the railway company for indemnity purposes, and authorized its selection for such purposes.

No reason appears in the agreed statement of facts why said land could not be selected for indemnity purposes. It was public land of the United States. It was within the indemnity limits of the grant to the road. At the time of selection it was free from conflict.

The grant to the railway company of lands within the place limits was only of odd sections; but the grant for indemnity purposes was of public lands outside of the ten mile limits and within 20 miles of the line of the road. This is determined from the wording of section 1 of the act, which is as follows: * * *

"But in case it shall appear that the United States have, when the line of said road is definitely located, sold any section or any part thereof granted as aforesaid or that the right of pre-emption or homestead settlement has attached to the same or that the same has been reserved by the United States for any purpose whatever, then it shall be the duty of the Secretary of the Interior to cause to be selected for the purposes aforesaid from the public lands of the United States nearest to the sections above specified, so much land as shall be equal to the amount of such lands as the United States have sold, reserved or otherwise

appropriated or to which the right of homestead settlement or pre-emption has attached as aforesaid, which lands thus indicated by the direction of the Secretary of the Interior, shall be reserved and held for the state of Kansas for the use of said company by the said secretary for the purpose of construction and operation of said road as provided by this act." (App. H.)

The right to take such lands as indemnity lands was affiirmed by this court in case of

M., K. & T. vs. United States, 141 U. S. 358;

s. c. 12 Sup. Ct. Rep. 13,

in which the question of the right to take even-numbered sections within the place limits of the grant to the L., L. & G. of March 3, 1863, and also within the indemnity limits of said grant to that company, was before this court. It was there determined that within the place limits of the Leavenworth road, no selection of even numbered sections could be made, because they had been reserved to the government for specific purposes; that there was no reservation of the even numbered sections within the indemnity limits of the grant to that company, and that by the wording of the act of July 26, 1866, congress specifically granted the right to the M., K. & T. railway company to select as indemnity lands even numbered sections within the indemnity limits of the L., L. & G. We here quote the language of the court:

"But we are of the opinion that, in respect to the even-numbered sections within the indemnity limits of

the Leavenworth road,—that is, outside of 10 and within 20 miles of its line,—the case stands upon wholly different grounds. We cannot assent to the suggestions that they also were reserved by the act of 1863, and excluded from the operation of the act of 1866. The utmost that could be claimed, in respect to lands within the indemnity limits of the Leavenworth road, is that the odd-numbered sections in those limits, being designated by the act of 1863 as the source from which to supply losses in the place limits of that road, were excluded from the operation of the act of 1866. Whether such a claim could be sustained or not we need not now inquire; but that contention, if sound, does not meet the exigencies of the present case. We are dealing here with the even-numbered sections in the indemnity limits of the Leavenworth road, which were not devoted by the act of 1863 to any specified purpose, but were left under the general laws regulating the disposal of the public lands. No provision was made, as in the case of the even-numbered or reserved sections within the place limits, for their sale at not less than double the minimum price of the public lands when sold, nor were any restrictions placed upon their sale or disposition different from those applicable to the public lands generally. Settlers under the pre-emption and homestead laws were accorded by the act of 1863 no more rights and privileges in respect to the even-numbered sections within the indemnity limits of the Leavenworth road than they had in other public lands of the United States wherever situated. They were reserved to the United States only in the sense that all the public lands of the United States, not set apart for some declared object, are reserved to be disposed of under the general laws relating to the public domain. But a reservation of that general character is not what was meant by the act of 1866. That act excluded from its operation only such lands as had been reserved by congress or other competent authority for some distinct, defined purpose.

This conclusion finds support in the peculiar language of the act of 1866 allowing selections by the Missouri-Kansas Company of indemnity lands, within 20 miles of its road, to be made from 'the public lands

of the United States nearest to the sections above specified,' that is, nearest to the odd-numbered sections within the place limits. Many acts of congress, making grants of public lands in aid of the construction of railroads, have restricted the selection of indemnity lands, simply to alternate sections or parts of sections nearest or most contiguous to the tier of sections in the place limits; thus apparently leaving it to the secretary of the interior—subject, it may be, to the requirement as to alternation—to approve, as he might think best, the selection of odd-numbered or even-numbered sections within the prescribed limits. In many other acts the selection of indemnity lands was restricted to the odd-numbered sections, as was the case in the above act of 1863. The two classes of acts are to be found in the legislation of congress at the session the act of July 26, 1866, for the benefit of the Missouri-Kansas Company, was passed. The grants to Missouri and Minnesota of July 4, 1866; to Kansas of July 23, 1866; to the California & Oregon railroad company of July 25, 1866; and to the Atlantic & Pacific railroad company of July 27, 1866,—all, in terms, provided for the selection of odd-numbered sections for purposes of indemnity; while the grant to Kansas of July 25, 1866, to aid in the construction of the Kansas & Neosho Valley railroad company, and the grant of July 26, 1866, to the same state, for the benefit of the Missouri-Kansas Company, contained no such restriction, and only required that indemnity lands be selected from the public lands of the United States nearest to the tier of granted sections within the place limits of the respective roads. 14 St. p. 83, c. 165; Id. p. 87, c. 168; Id. p. 210, c. 212; Id. p. 239, c. 242; Id. pp. 293, 295, c. 278; Id. p. 236, c. 241; Id. p. 289, c. 270. This difference in land-grant acts was not unusual, as will be seen from the various statutes cited in the margin We do not feel at liberty to hold that this difference was unintentional upon the part of congress. It is too well defined in its legislation to justify any such interpretation. The words in the act of July 26, 1866, for the benefit of the Missouri-Kansas Company, indicating the source from which indemnity lands were to be obtained, namely, 'from the public lands of the United States nearest to sections above specified,' cannot be well held to mean the same thing

as the words, in other acts, 'from the public lands of the United States nearest to tiers of sections above specified, so much land in alternate sections or parts of sections designated by odd numbers.' In one case the selection, for purposes of indemnity, may be from any of the public lands of the United States nearest to the tier of sections in the place limits; in the other, the selection is restricted to odd-numbered sections within the indemnity limits; in neither case, however, could lands be selected that had been previously withdrawn by competent authority from location, sale, or entry, or had been appropriated or sold by the United States, or to which pre-emption or homestead rights had attached.

In our judgment,—omitting for the present any consideration of the rights alleged to have been acquired by the individuals under the homestead and pre-emption laws in the lands in dispute, and looking at the case only as between the United States and the Missouri-Kansas Company,—there is no escape from the conclusion that the even-numbered sections within the indemnity limits of the Leavenworth road, not being set apart by the act of 1863 for any specific purpose, and being also nearest to the granted sections within the place limits of the Missouri-Kansas Company, were not, by that act, reserved to the United States, within the meaning of the act of 1866, and therefore—if no rights had attached to them before their selection with the approval of the secretary of the interior—could have been legally selected as indemnity lands for that company."

In the case of So. Pac. vs. Bell, 22 Sup. Ct. Rep. 232, quite recently decided by this court, it was held that the selection by the railway company of indemnity land perfects its right to it.

The moment this land was selected by the railway company with the approval of the land department of the United States, and a certificate issued to it, it became its private property, and as such was subject to

local taxes and to barter and sale, to the same extent as any other property owned by the company.

In case of Carroll vs. Safford, 3 Howard, 441, this court decided that when the purchaser of land from the United States has paid for it and received a final certificate, it is taxable property, according to the statute of Michigan, although a patent has not yet been issued; that it was competent for the state to assess and tax such lands at their full value as the absolute property of the holder of the final certificate, and in default of payment to sell them as if he owned them in fee. We here quote the language of the court:

"It is first contended that the statutes of Michigan did not embrace the land in question, and were not intended to authorize their assessment.

In answer to this, it may be said, that a different construction has been put upon the above statutes by the authorities of the territory, and, also, of the State since its admission into the Union. The practical construction of local laws is, perhaps, the best evidence of the intention of the law makers. The courts of the United States adopt as a rule of decision the established construction of local laws. And it cannot be material, whether such construction has been established by long usage or a judicial decision.

But independently of the force of usage, we think the construction is sustainable. When the land was purchased and paid for, it was no longer the property of the United States, but of the purchaser. He held it for a final certificate, which could no more be cancelled by the United States than a patent. It is true, if the land had been previously sold by the United States, or reserved from sale, the certificate or patent might be recalled by the United States, as having been issued through mistake. In this respect there is no difference between the certificate holder and the patentee.

It is said the fee is not in the purchaser, but in the United States, until the patent shall be issued. This is so, technically, at law, but not in equity. The land in the hands of the purchaser is real estate, descends to his heirs, and does not go to his executors or administrators.

In case of Witherspoon v. Duncan, 4 Wal. 210, this court again decided that when the entry of land is made and certificate given, that particular land is segregated from the mass of public lands and becomes private property. The power of the state to tax exists as soon as the ownership is changed, and this is the effect when entry is made on the terms and in the modes allowed by law. Such lands are, under the laws of the state, properly chargeable with states taxes from the date of the first entry. In its opinion the court said:

"According to the well known mode of proceeding at the land offices (established for the mutual convenience of buyer and seller), if the party is entitled by law to enter the land, the receiver gives him a certificate of entry reciting the facts, by means of which, in due time, he receives a patent. The contract of purchase is complete when the certificate of entry is executed and delivered, and thereafter the land ceases to be a part of the public domain. The government agrees to make proper conveyance as soon as it can, and in the meantime holds the naked legal fee in trust for the purchaser, who has the equitable title. As the patent emanates directly from the President, it necessarily happens that years elapse, before, in the regular course of business in the General Land Office, it can issue; and if the right to tax was in abeyance during this time it would work a great hardship to the State; for the purchaser, as soon as he gets his certificate of entry, is protected in his proprietary interest, can take possession, and make valuable and lasting improvements, which it would be difficult to separate from the freehold for the purpose of taxation. If it was the

purpose of the Acts of Congress, by which the new states were admitted into the Union, to prohibit taxation until the patent was granted, the national authority would never had suffered, without questioning it, the universal exercise of the power to tax on the basis of the original entry.

This question was fully considered by this court in Carroll vs. Safford, 3 How., 450, and the views we have presented only re-affirm the doctrines of that case."

It is immaterial whether the certificate issued to a party who has paid cash for the land, or whether in compliance with a donation made by congress. If the law is complied with and the entry conforms to it, the effect is the same. This proposition is also decided in the last case cited, where this court said:

"But it is insisted that there is a difference between a cash and a donation entry—that the one may be complete when the money is paid, but the other is not perfected until it is confirmed by the General Land Office and the patent issued.

That congress has the entire control of the public lands, can dispose of them for money, or donate them to individuals or classes of persons, cannot be questioned. If the law on the subject is complied with, and the entry conforms to it, it is difficult to see why the right to tax does not attach as well to the donation as to the cash entry. In either case when the entry is made and certificate given, the particular land is segregated from the mass of public lands, and becomes private property. In the one case, the entry is complete when the money is paid; in the other, when the required proofs are furnished. In neither can the patent be withheld if the original entry was lawful."

The selection by the railway company of the land in controversy and the approval of the same by the land department, is a conveyance to the company of the equitable title to said land and prima facie evidence

of its right to the legal title. The consideration for the transfer is the construction of the road by the company, in accordance with the terms of the grant, which are clearly expressed in the act of July 26, 1866. (App. H.)

This court will take judicial notice of the fact that there was a deficiency of lands within the place limits of the grant, because by the act of July 1, 1862 (App. A.) and the amendatory act of July 2, 1864 (App. B.) a grant was made to the Union Pacific of each alternate section designated by odd numbers, for 10 sections per mile on each side of the line of road.

The act of July 26, 1866 required the Kansas Company to build from a point at or near Fort Riley in a southeasterly direction to Fort Smith Arkansas. The Union Pacific line was then located from Fort Riley to the west line of the state in accordance with the act of congress of July 3, 1866, (14 Stat. at Large, 79.) The map designating the general route of its road under said act, from Fort Riley to the west line of the state by way of Smoky Hill river, was filed in the office of the secretary of the interior July 11, 1866 On the 26th of the same month, the odd sections of land upon this route were withdrawn from sale, by order of the secretary of the interior. Previous to this time, the Leavenworth, Pawnee & Western railroad company a corporation organized under the laws of Kansas, afterwards known as the Kansas Pacific railroad, under authority conferred by the 9th section of the act of July 1, 1862, had constructed a line of road commencing at the mouth of the Kaw river on the south

side of the Missouri, running thence to Fort Riley, Kansas. Then for 20 miles, the route of the Kansas company, from its commencement at or near Fort Riley, lay directly through the grant made to the Union Pacific road. By the terms of the act of July 26, 1866, the Kansas company was granted only the odd numbered sections within the place limits, and these lands, by the acts of 1862 and 1864, had previously been granted to the Union Pacific.

In the case of M. K. & T. Ry. Co. v. K. P. Ry., 7 Otto, 491, the contention was as to which of these companies was entitled to the odd numbered sections within the limits of their overlapping grants. The court in its decision said:

"The rights of the contesting corporations to the disputed tracts are determined by the dates of their respective grants, and not by the dates of the location of the routes of their respective roads, although in this case the location of the route of the plaintiff's road was earlier than that of the defendant's road."

This decision gave the K. P. Ry. Co., under the grant of 1862 to the Union Pacific Ry. Co., and the acts amendatory thereof, the odd numbered sections within twenty miles of the line of the road.

When congress passed the act of July 26, 1866, it certainly understood that no lands within the place limits designated in that act, would pass to the Kansas company within the limits of the grant to the Union Pacific, and therefore attempted to provide for supplying the deficiency. By the terms of said act, the Kansas company could go outside of the 10 mile limit and within the indemnity or 20 mile limit, and

take from the public lands indemnity for this deficiency or loss. The language of the act authorizing the selections, and describing the lands from which they may be taken is as follows:

"To be selected for the purposes aforesaid, from the public lands of the United States nearest to the sections above specified, so much land as shall be equal to the amount of such lands as the United States have sold, reserved, or otherwise appropriated, or to which the right of homestead settlement or pre-emption has attached as aforesaid."

The odd numbered sections granted to the Union Pacific road, where they lie within the place limits of the grant to the Kansas Company, were, under the act of July 26, 1866, a reservation by the United States for the purposes of the grant to the former company, and for which it agreed to indemnify the Kansas Company by permitting it to select other lands in lieu thereof. There can be no question, it seems to me, but that the land in controversy, even though it lay within the limits of the grant to the Union Pacific road, was land directly granted and reserved by congress under the act of July 26, 1866, for the benefit of the Kansas Company.

Paragraph 4 of the agreed statement of facts shows that the land in question, with other lands, was withdrawn from market and from the operation of the homestead and pre-emption laws of the United States, by the secretary of the interior, as contemplated and provided in the act of congress of July 26, 1866, on April 6, 1867, which is the date the register and receiver of the U. S. land office at Salina received notice of

such withdrawal. The withdrawal of lands for indemnity purposes is expressly authorized by the following language used with reference thereto, in section 1 of said act:

"Which lands, thus indicated by the direction of the Secretary of the Interior, shall be reserved and held for the State of Kansas for the use of said company by the said Secretary for the purpose of the construction and operation of said railroad, as provided by the act."

Not only does the above language authorize a withdrawal from the operation of settlement laws of lands for indemnity purposes, but the necessary amount of indemnity lands to supply the deficiency in the place limits is absolutely granted by the act, as fully and effectually as are the lands within the place limits, as appears by the language of the last proviso of said section 1:

"And provided, further, That said lands hereby *granted* shall not be *selected beyond twenty miles from the line of said road.*"

And again, section 4 of the act of July 26, 1866, makes it the duty of the Secretary to withdraw from market the land granted by the act, in such manner as may be best calculated to effect the purposes of the act and subserve the public interest. The exact wording of the sections is as follows:

"And be it further enacted, that as soon as said company shall file with the Secretary of the Interior maps of its line, designating the route thereof, it shall be the duty of said Secretary to withdraw from the

market the lands granted by this act, in such manner as may be best calculated to effect the purposes of this act and subserve the public interest."

The words "lands granted by this act," in above section, refer to all the lands which are granted. The words "hereby granted" used in the last proviso of section 1 of the act, refer specifically to the lands within the indemnity limits, and indicate that the grant both as to lands within the place limits and those within the indemnity limits is a present grant.

Upon the definite location of the line of the road, the limits of the grant became fixed and determined, and the lands both within the place limits and the indemnity limits were, by the authority of the act severed from the mass of the public lands and devoted exclusively to the construction of the road. The lands within the indemnity limits could not be taken under the homestead or pre-emption laws after the line of the road was definitely located and the lands withdrawn, until the deficiency which existed within the place limits of the grant had been supplied therefrom. The prior right of the railway company to take lands within the indemnity limits of its grant is directly given by the terms of the act, and if a surplus remained after the deficiency within the place limits had been filled by the selection of lands within the indemnity limits, such surplus could only be restored to the public domain by an act of congres. or other competent authority.

In case of Winona & St. P. v. Barney, 113 U. S., 618, two questions were presented to this court: The

first related to the deficiencies in the sections designated as granted in the act of 1857, arising from sales and attachment of pre-emption rights previous to the final determination of the route of the road, and the extent to which indemnity for these deficiencies might be supplied from other lands. The second related to the reservation from the operation of the act of 1865 of lands previously granted to Minnesota to aid in the construction of any railroad, which were located within the limits of the extension made by that act to the original grant, and its effect on the amount of lands claimed by the plaintiff. This court said:

"The solution of these questions depends of course upon the construction given to the acts making the grants; and they are to receive such a construction as will carry out the intent of congress, however difficult it might be to give full effect to the language used if the grants were by instrument of private conveyance. To ascertain that intent, we must look to the condition of the country when the acts were passed, as well as to the purpose declared on their face and read all parts of them together."

The act of July 26, 1866, must be construed with reference to the condition of the country, at the time it was passed, through which it was proposed to build the road designated in the grant. There was a deficiency within the place limits of the grant made by that act to the Kansas company, where it overlapped the grant to the Union Pacific road. There was also a deficiency where it crossed the Atchison, Topeka & Santa Fe at Emporia, because of the prior grant to the state for the benefit of that company, made by the act of March 3, 1863. (12 Stat. at Large, 772.) There was

likewise a deficiency where it crossed the line of the Leavenworth, Lawrence & Galveston at Chanute, because of the prior grant to that company made by said act of March 3, 1863. There was a further deficiency both within the place and indemnity limits, where the line of said road passed through the Osage Indian reservation. (L. L. & G. v. U. S. supra.)

Then for more than one hundred miles, or nearly two-thirds of the distance along the line of the road from Fort Riley to the south line of the state, there was not an acre of land available to the Kansas company within the place limits of its grant. When congress passed the act of 1866, it knew of the existence of these deficiencies within the place limits, and provided and granted a liberal indemnity from which they could be supplied.

We think it is clear from the wording of the act of July 26, 1866, that congress intended no restriction upon the right of the company to take its indemnity from any of the public lands; that is, lands that were public when the selection was made. The fact that at the time of the grant, Walters' entry on the land was of record and uncancelled, is of no consequence whatever. If the land had been within the place limits of the grant, it would have passed to the company by virtue of the grant within the rule laid down by this court in case of

Northern Pac. v. DeLacey, 19 Sup. Ct. Rep., 791,

that under the acts of 1841 and 1843 twelve months

were allowed in which to make final proof and payment for lands offered, and that since 1871 all preemption claimants must make their final proof and payment within thirty months. The language of the court is:

"We thus find that since 1871 all claimants of preemption rights lost those rights by operation of law, unless within 30 months after the date prescribed for filing their declaratory notices they made proper proof and payment for the lands claimed. The filing of their declaratory statement and the record made in pursuance of that filing, became without legal value, if, within the time prescribed by the statute, proper proof and payment were not made. Whether such proof and payment were made would be matter of record, and, if they were not so made, the original claim was canceled by operation of law, and required no cancellation on the records of the land office to carry the forfeiture into effect. The law forfeited the right and canceled the entry just as effectually as if the fact were evidenced by an entry upon the record. The mere entry would not cause the forfeiture or cancellation. It is the provision of law which makes the forfeiture, and the entries on the record are a mere acknowledgment of the law, and have, in and of themselves, if not authorized by the law, no effect. The law does not provide for such a cancellation before it is to take effect. The expiration of time is a most effective cancellation.

In such a case as this, where the forfeiture occurs by the expiration of the 30 months within which to make proof and payment, the record shows that the claim has expired; that it no longer exists for any purpose; and therefore it cannot be necessary, in order that the law shall have its full operation, that an acknowledgment of the fact should be made by an officer in the land office. The law is not thus subject to the act or the omission to act of that officer."

The entry of Walters upon the land in controversy was that of a homesteader, and, according to the commissioner's letters "C" (R. 19) and "F" (R. 20), he was required to make proof of settlement and cultivation within seven years from the date of his entry, which was June 2, 1863. The time in which he was required to make the proof would have expired on June 2, 1870, but according to his affidavit (R. 21) he abandoned the land on April 1, 1865, and removed the improvements therefrom. Although such abandonment was not noted on the record, yet the fact existed, and the land being unoccupied and free from conflict would have passed under the grant to the M. K. & T. railway company, if it had been within the place limits. There is certainly nothing in the history of the title to this piece of land which excepted it from the indemnity given the company by the act of July 26, 1866.

(a) It Was Not Within The Jurisdiction Of The Land Department To Cancel The Selection By The Missouri, Kansas & Texas Ry. Co., Of The Land In Controversy, After Its Conveyance By The Company, Without Notice To All The Transferees Of The Company.

The agreed statement of facts (R. 15 to 21) shows that the land commissioner on May 13, 1886 canceled the selection of the land by the railway company. His reasons therefor are given in his letter "F" (R. 20) viz: that the homestead entry of Walters was of record and uncanceled on the date of the grant to the M. K. & T. of July 26, 1866; that the land was within the limits of

of the grant to the Union Pacific road made by the acts of July 1, 1862, (App. A) and July 2, 1864, (App. B.) and being in an even numbered section was, by the terms of said grant, reserved to the United States for disposal at double minium rates, for the purpose of reimbursing the government for the lands granted the senior company, and that the Kansas company did not designate any particular land lost to the grant for which the tracts in question were selected by the company.

It is true that the cancellation of the homestead entry of Walters was not made until after the date of the grant of 1866 to the M., K & T., although he had abandoned the land in 1865. The Kansas company claimed the right to select it as indemnity land, because at the time of such selection it was public land. The commissioner is mistaken when he says that by the terms of the acts of July 1, 1862 and July 2, 1864 there was a reservation of even numbered sections within the limits of the grant to the Union Pacific road for any purpose. There was not an intimation in either of the acts making the grant to the Union Pacific, of any reservation of the even numbered sections. When the homestead entry of Walters was cancelled, the land was restored to the public domain. It was not reserved; consequently it was within the power of the commissioner to dispose of it under general laws. It was public land of the class from which the Kansas company was authoried to make selection for indemnity purposes.

There was no limitation upon the right of the com-

pany to take public lands within the indemnity limits of its grant. There is nothing in the act of July 26, 1866 which limits the company to such lands as may be public lands at the time of the grant, or at the time of the location of the line of its road. Having disposed of the land by permitting the company to make the selection, it was not within the power of the commissioner to arbitrarily cancel it, except for fraud, or a want of authority to dispose of it to the company, or by reason of some mistake. Even then the commissioner is not permitted to make the cancellation without notice to the transferees of the company.

In the case of Hawley v. Diller, 20 Sup. Ct. Rep., 986, this court, referring to the power of the land department to cancel an original entry of land, said:

"It is contended that the Land Department was without jurisdiction to cancel the original entry. The exclusion of mere speculators from purchasing the public lands referred to in the timber and stone act would be of no practical value if it were true that one, having purchased in good faith from an entryman who is proved to have sworn falsely in his application, could demand, of right, that a patent be issued to him. The Land Department has authority, at any time before a patent is issued, to inquire whether the original entry was in conformity with the act of Congress. Knight v. U. S. Land Asso. 142 U. S. 161, 35 L. ed. 974, 12 Sup Ct. Reo. 258. and Mich. Land & Lumber Co. v. Rust, 168 U. S. 589, 593, 42 L. ed. 591, 592, 18 Sup. Ct. Rep. 208, authorities cited in each case. *Of course, that Department could not arbitrarily destroy the equitable title acquired by the entrymen, and held by him or his assignee. Those who hold such title have a right to be notified of and heard in any proceeding instituted in the Land Department having for its object the cancelation of the entry upon which the equitable title depends.*"

In the case of Cornelius v. Kessel, 128 U. S., 456, speaking with reference to the power of the land department to supervise and correct entries of public lands erroneously made, this court decided that such power existed, and said:

"But the power of supervision and correction is not an unlimited or an arbitrary power. It can be exerted only when the entry was made upon false testimony, or without authority of law. It cannot be exercised so as to deprive any person of land lawfully entered and paid for. By such entry and payment the purchaser secures a vested interest in the property and a right to a patent therefor, and can no more be deprived of it by order of the commissioner than he can be deprived by such order of any other lawfully acquired property. Any attempted deprivation in that way of such interest will be corrected whenever the matter is presented so that the judiciary can act upon it."

In the case of Mich. Land & Lumber Co. v. Rust, 18 Sup. Ct Rep., 208, this court said, with reference to the power of the land department to cancel entries of public lands;

"It is, of course, not pretended that, when an equitable title has passed, the land department has power to arbitrarily destroy that equitable title. It has jurisdiction, however, after proper notice to the party claiming such equitable title, and upon a hearing, to determine the question whether or not such title has passed."

Paragraph 12 of the agreed statement of facts (R. 18) affirmatively shows that no notice whatever was ever given the plaintiff in error Clark, or any of his grantees, of the pendency of any contest over said land in the U. S. land office. Then, if the decisions of this court above cited mean anything, they mean that the

act of the commissioner in canceling the selection of the land by the company, under the circumstances shown to have existed at the time, was and is void for want of notice to Clark and his grantees. In fact, there is nothing in the agreed statement of facts to show that any contest was ever instituted in the land department. It seems that the department arbitrarily, and without notice to any one, set aside the selection at the request of Cox, who desired to enter the land as a homestead.

The selection of the land by the railway company was authorized on January 13, 1877 by commissioner J. A. Williamson (letter "F," R. 19), but it was not actually selected until October 22, 1877. (R. 13 & 14.) It was cancelled on May 13, 1886, nine years and four months after the ruling of commissioner Williamson, by acting commissioner Stockslager, without notice. (R. 20.) It does appear, however, that after the commissioner had cancelled the selection, the railway company was advised of the fact and given the right to appeal from the order of cancellation. (Letter "F," R. 20 and Par. 21, R. 18.) The railroad company had long prior to that time sold and deeded the land to Clark and the defendant in error was then the owner of it.

In the case of Cornelius v. Kessel, supra, it is decided that the power of the land department to supervise and correct entries of public land erroneously made, can only be exercised when entry is made upon false testimony, or without authority of law. It is not claimed that the selection by the railway company was

secured by false testimony, nor is it claimed that the permission given the company by the department to select the land was without authority of law. No such claim could be made, unless there was a specific law reserving this land, or appropriating it to some other and different purpose.

It was claimed in the state court that the land, being an even numbered section and within the limits of the grant to the Union Pacific, was reserved to the government for sale as double minimum land, to indemnify it for the donation it had made to the Union Pacific road by the acts of July 1, 1862 and July 2, 1864. Such claim is not warranted by the wording of either of said acts, or any subsequent act of congress. It is not to be supposed that congress ever considered these land grants as mere donations. There was an important consideration for them, which was to secure the transportation of the mails, troops, munitions of war and supplies between points occupied as government posts, and to secure speedy and safe communication between them, the intervening space being wild, unsettled territory. There was still a further and more important consideration, and that was to facilitate and develop the settlement of the country. These were the objects sought to be gained by congress in making these grants, and they were considered a sufficient consideration for making them. There is not in any of the grants, either to the Union Pacific or the M., K. & T., an intimation that the government desired to reimburse itself in any other way for the lands granted.

It is true that on March 6, 1868, congress passed

an act entitled "An Act restoring lands to market along the line of the Pacific railroads and branches." (App. D.) But this act simply construes the acts of July 1, 1862 (App. A.) and July 2, 1864, (App. B.) or any other act *amendatory of these acts*, as not authorizing the withdrawal of even-numbered sections from homestead and pre-emption settlement. It authorizes the secretary of the interior to restore to the public domain all such lands withdrawn from market. The act has no reference to any grant of these lands made by a subsequent act of congress. The act of July 26, 1866 granting lands to the Kansas company had been passed nearly two years prior, and the even numbered sections within the limits of the Union Pacific grants had been withdrawn by the department for the benefit of the Kansas company under the act. (Letter "F" R. 20.)

If, when congress passed the act of 1868, it had intended that these lands should not be subject to the grant of 1866 to the Kansas company, it would have used appropriate words to express such intent, and the fact that it makes no reference to the withdrawal made under the act of 1866 is significant,—in fact is a conclusive argument that congress only intended to compel the department to restore the lands that had been withdrawn under the acts granting lands to the Union Pacific railroad, to-wit, acts of July 1, 1862 (App. A.) and July 2, 1864 (App. B.) and did not intend to interfere in any way with the subsequent grant of these lands to the Kansas company by the act of July 26, 1866.

If we are correct in our construction of the act of 1866, then there is no presumption that the act of March 6, 1868 was intended to embrace the even numbered sections within the indemnity limits of the grant made by said act of 1866. In the case of

Wilcox v. Jackson, 13 Pet. 498, this court said:

"We go further and say that whenever a tract of land shall have been once legally appropriated to any purpose, from that moment the land thus appropriated becomes severed from the mass of public lands, and no subsequent law, proclamation or sale would be construed to embrace or operate upon it, although no reservation were made of it."

Leavenworth etc. R. R. Co. v. U. S., supra.

(b) The Plaintiff In Error, Clark, Is An Innocent Purchaser For Value, Of The Title To The Land In Controversy, And He And His Grantees Are Entitled To Protection As Such.

Paragraph 12 of the agreed statement of facts (R. 17) shows that Clark paid the full purchase price of said land to the railway company, and received from it a warranty deed for the same. Par. 20 shows that Lee Clark and each subsequent grantee at the time of his purchase, believed the railway company had good title to the land. Par. 24 shows that at the time of the selection, the railway company paid the amount of fees due upon said land. After certificate was issued to the railway company showing its selection of the land and the payment of the legal fees therefor, nothing remained to be done except to issue patent therefor.

The railway company had complied with the act of July 26, 1866, and so far as we know, with all the rules of the department providing for obtaining lands by selection.

Clark and his grantees could not claim to be bona fide purchasers within the meaning of the term as used in courts of equity; but he and his grantees are *innocent* purchasers, and as such are entitled to protection under the acts of March 3, 1887, (App. E) March 3, 1891, (App. F) and March 2, 1896 (App. G), and under the decision of this court in the case of

United States v. Winona & St. P. Ry. Co., 17 Sup. Ct. Rep. 368.

Sec. 5 of the act of March 3, 1887 was intended to protect parties who in good faith purchased land from a railway company lying within the limits of its grant, but for some reason did not pass to the company by the terms of the grant. Justice Brewer, in his opinion in the case of

U. S. v. Winona & St. P. Ry. Co., supra, said:

"Section 5 of the same act applies to cases in which no certification or patent has issued, and yet the land sold by the railroad company are the numbered sections prescribed in its grant, and coterminous with the constructed portions of its road; and it is there provided that, where the lands so sold by the company 'are for any reason excepted from the operation of the grant to said company,' the purchaser may obtain title directly from the government by paying to it the ordinary government price of such lands. It is true the term used here is 'bona fide purchaser,' but it is a bona fide purchaser from the company, and the description given of the lands, as not conveyed, and 'for any reason excepted from the operation of the grant' indicates

that the fact of notice of defect of title was not to be considered fatal to the right. *Congress attempted to protect an honest transaction between a purchaser and a railroad company, even in the absence of a certification or patent.* These being the provisions of the act of 1887, the act of 1896, confirming the right and title of a bona fide purchaser, and providing that the patent to his lands should not be vacated or annulled, must be held to include one who, if not in the fullest sense a 'bona fide purchaser' has, nevertheless, purchased in good faith from the railroad company."

There is nothing in the record in this case to show that the transaction by which Clark purchased the land in controversy from the railway company was not an honest one. If there ever was a case where a party could invoke the power of a court of equity, then Clark and his grantees can do it in this case. There is not a circumstance presented by the record from which bad faith in the transaction on either side could be inferred.

The land, at the time it was purchased from Clark, was known to be within the indemnity limits of the grant to the Kansas company of July 26, 1866, The commissioner had determined that it was of the class of lands from which the company could select its indemnity. The act of 1866 expressly provided that the selections should be made under the direction of the secretary of the interior, for indemnity purposes At the time of the sale to Clark, the validity of the selection by the company was unquestioned, nor was it questioned until after the defendant in error became the owner of the land. When we consider all these things, the language of Justice Brewer in the Winona case just quoted, is peculiarly applicable; and if, as he says, it was the intention of congress to protect an

honest transaction between an individual and the railroad company, this case certainly comes within the rule.

Clark had an Indefeasible Title Which he Could Convey and Transfer, and His Grantee Would Thereby become Possessed of an Indefeasible Title Which Could not be Questioned, Except by one Holding a Prior Homestead or Pre-emption Right to the Land.

No individual will be wronged by sustaining the transaction between the railway company and Clark. It is not contended that the homestead claimant in this case had either homestead or pre-emption rights, accruing prior to its selection by the railway company, or prior to any of the sales disclosed in the record. To permit him to take the land under either the homestead or pre-emption laws would be to undo all the transactions disclosed by the record in this case, and which seem to have been made in the utmost good faith.

Even though it should be conceded that the land department was in error when it permitted the selection of the land by the railway company, still the purchase of the same by Clark having been in good faith and in reliance upon the validity of the selection by the M., K. & T. he and his grantees are entitled to protection under the act of March 3, 1887, and the decision of Justice Brewer in the Winona case, from which we again quote:

"It is in the light of these facts that the scope and

effect of the legislation of congress is to be considered and determined. There is certainly much equity in the contention of the appellees. The railroad company has constructed the road, in aid of whose construction congress made this grant. Even though retaining all these tracts, it has failed to receive as large an amount of land as congress proposed to give. With full performance on its side, it has not received all that congress proffered. Of course, in entering upon its work, it took all the chances of failure of title of any particular tract, and therefore has no legal ground of complaint; and yet it may with reason say that, though it must be content with such lands as the government at the time of the filing of the map of definite location could rightfully convey, it ought not to be deprived of any which the government did convey, and could covey without wrong to any one, and which were embraced in the description of the lands which congress proposed to give. No individual is wronged by permitting this certification to stand. No pre-emptor or person seeking to enter any tract as a homestead has been deprived of his rights or privileges by virtue of this certification. The land was free from all individual claims. It was within the absulute control of congress. It belonged to the government, and it is only in the assertion of a technical rule of construing land grants, first declared by this court long after the certification, that the government now asks to have that set aside. and the title to these lands restored. No fraud or wrong is imputable to the company; no effort to secure a misconstruction by the land department; but only an acceptance of the then settled rule of construction, and the taking of the lands which under such construction, it was entitled to receive. Conceding that that construction was erronous, yet it was one made by the officers of the department charged with the duty of administering the grant, and determining what lands did and what did not pass,—the only tribunal to which the company could then apply, and upon whose ruling it was bound to act. Many years have passed since the certification, and since the company, in reliance upon the title it believed it had acquired, has disposed of the lands, and other parties have become interested in, and have dealt with, the lands as

private property. Contracts have been entered into, suits maintained (carried even to this court,) and decrees and judgments entered and rendered in full reliance upon the title supposed to have been conveyed. Surely, after such a lapse of time, and after so many transactions in and in respect to these lands, the appellees are justified in saying that they have large claims upon the equitable consideration of the courts."

It is true that in the Winona case the action was by the government against the railway company to set aside the certification, while in the case at bar, the action is between grantees of the railway company. If the title can be sustained in an action by the government as against the company, then there can be no eviction by any one claiming to enter the land under the homestead or pre-emption laws, for the reason that if the government, in a direct proceeding against the railway company, or any of its grantees, could not set aside this selection and restore the land to the to the public domain, then no one who intends claiming the land under the homestead or pre-emption laws could, by a mere entry or otherwise, oust Clark, or any of the grantees of the company.

Under section 5 of said act of March 3, 1887, the title of the defendant in error to the land in controversy is superior to that of any homestead or pre-emption claimant who asserts his claim subsequent to the sale of the land by the railway company. The defendant in error could, if he desired, go before the land department and make a showing of the fact that he was an innocent purchaser of the land, and under section 5 above referred to, he would be entitled to a patent. In that event, he could make the railway com-

pany pay the costs of the proceedings in the land office, and other expenses incident thereto. He cannot claim a breach of warranty as against his immediate grantor. To constitute a breach of warranty the title must be such as cannot be sustained as against the party contesting it. Under the facts disclosed in this case, at the time of the claimed eviction by Cox, Herington, had the only title to the land:

U. S. v. Winona & St. P. Ry., supra;

Burr v. Greeley, 52 Fed. 926;

Act March 3, 1887;

Act March 3, 1891;

Act March 2, 1896.

The decision of the land department by which the selection by the M., K. & T. of the land in controversy was canceled, and Cox was premitted to enter it under the settlement laws of the United States, it appears from the agreed statement of facts and exhibits thereto, was purely ex parte, without notice to the grantees of the railway company and without giving them any opportunity to be heard. For that reason it is void.

It may be contended that the decision of the department is binding upon the parties and upon this court; but that cannot be where the facts disclose as they do in this case, that such decision was entirely ex parte and without any notice to the interested parties. In any event it was a decision upon a question of law, and is not binding upon this court.

In case of Northern Pac. Ry. v. Colburn, 17 Sup. Ct. Rep. 98, this court said:

"A decision by the secretary of the interior that the mere occupation and cultivation of land creates such a claim as will prevent it from passing under a grant by congress to a railroad company, is a decision on a question of law, which does not conclude the parties, but may be reviewed in a collateral proceeding to recover the purchase money, by one to whom the company had agreed to convey title."

II.

There Can Be No Breach Of The Covenant Of Warranty Except By Eviction Of The Grantee By The Holder Of A Paramount Title.

There has been no failure of title in this case. Herington was in possession of the land under the title conveyed to him by virtue of the several deeds set out as exhibits in his petition, and he permitted Cox to enter upon same and take forcible possession thereof. It is true that Cox, about that time, to-wit, July 31, 1886, made homestead entry, which he relinquished and canceled on March 10, 1888. On July 26, 1888 he made declaratory statement alleging settlement on the land July 27, 1888, and afterwards made final proof and obtained final certificate from the land office on July 26, 1889.

There is nothing in the agreed statement of facts which shows that Herington resisted the entry of Cox. Herington was in possession and could have resisted force with force, if necessary, and Cox could not possibly have obtained possession of the land if Herington had made the necessary resistance to protect his right of possession, as well as his title thereto. His

submission to the claim of Cox and his acknowledgment of its validity, does not create or amount to an eviction, unless Cox then had paramount title. If he had remained in possession, compelled Cox to bring ejectment or forcible entry and detainer to oust him, and had defended his title in such proceedings and been defeated on the ground that his title and right of possession was not valid, then his claim of a breach of warranty could possibly be fully sustained. But he did not do this, and because of the fact that he failed to make resistance, failed to compel Cox to oust him from the possession of the land in a legal manner, he now in this action assumes the burden of proving that Cox had the paramount title thereto.

Cox was a mere stranger, who had no interest in the land whatever at that time. A disturbance by a stranger without claim to a paramount title will not constitute an eviction, and, if yielded to, no action can be maintained for breach of covenant of warranty.

Wells v. Castles, 3 Gray, (Mass.,) 33.

Royce v. Guggenheim, 106 (Mass.), 205.

Palmer v. Wetmore, 2 Sandf. (N. Y.), 316.

Hazlett v. Powell, 30 Pa. St., 293.

Schuylkill, etc., R'y. Co. v. Schmoele, 57 Pa. St., 273.

Moore v. Weber, 71 Pa. St., 429.

Walker v. Kirshner, (2 Kan. App. 371.)

No constructive eviction is claimed in this case, but it is claimed that there is an entire failure of title. The facts relied upon to show the failure of title are

fully disclosed in the agreed statement of facts: That Cox forcibly entered upon the land, and that after such entry he made purchase thereof and obtained a certificate from the government as a settler thereon. Such settlement was not claimed prior to July 27, 1888. His certificate of purchase was dated July 26, 1889, and from the evidence in this case, he had no interest prior to his settlement. To entitle the grantee to an action on a covenant of warranty, the eviction must be by one holding a paramount title.

Fowler v. Poling, 6 Barb.(N. Y.) 165.

There must be actual or constructive eviction of the whole or a part of the premises:

Beebe v. Swartwout, 8 Ill., 179;
Bostwick v. Williams, 36 Ill. 69;
Funk v. Creswell, 5 Ia., 88;
Mott v. Palmer, 1 N. Y., 564;
West v. Stewart, 7 Pa. St., 122.

While it is true a grantee may voluntarily yield possession upon demand by the owner of the paramount title, yet the demand must come from some person who then has the paramount title, and not from a person who expects to homestead or pre-empt the land and obtain a paramount title after he induces the owner of the legal title to leave the land.

It is perfectly clear that Cox had no right of possession, or title of any description to this land, at the time he took forcible possession thereof. It may be true that he believed Herington's title was not good; it

may be true—probably is true—that he believed the title was still in the government. It may be true that Herington believed the paramount title to be still in the Government. But at the time he permitted Cox to take forcible possession of the land, he knew Cox had no title or right of possession thereto, and that as between himself and Cox, he, having improvements on the land, could hold it as against Cox. When he voluntarily yielded possession to a party demanding the land, he did so at his peril, and in this action against his grantor upon the covenant, the burden of proof is on him to show that the title to which he yielded was really the paramount title.

Claycomb v. Monger, 51 Ill., 377;
Crance v. Collenbaugh, 47 Ind., 256;
Ryerson v. Chapman, 66 Maine, 557;
Smith v. Shepherd, 15 Pick. (Mass.) 147;
S. C. 25 Am. Decisions, 432;
Hamilton v. Cutt, 4 Mass., 352;
S. C. 3 Am. Dec. 222;
Merritt v. Moore, 108 Mass., 276.
Hall v. Bray, 51 Mo., 288;
Stone v. Hooker, 9 Cow. (N. Y.) 154;
Smith v. Sprague, 40 Vermont, 43;
Somers v. Schmidt, 24 Wis 417;
Walker v. Kirshner, Supra.

A covenant of warranty is not broken by eviction unless under a lawful and paramount title.

Gleason v. Smith, 41 Vermont, 96.

An illegal or tortious eviction is not a breach of a general covenant of warranty.

Patten v. Kennedy, 1 A. K. Marsh (Ky.) 389; s. c. 10 Am. Dec. 744.

Under the facts disclosed in this case, we insist there has been no eviction of Herington, nor has he been in any manner disturbed by any one having a paramount title. No legal proceedings were commenced by Cox to oust him. (Par. 23, R. 18.)

The taking of possession by Cox was forcible and tortious. (Par. 17, R. 18.)

Conclusion.

We are not unconscious of the fact that we have argued in the foregoing brief some questions of general law that this court may decline to consider. It seemed to us necessary to do so in order to present the equitable rights of the plaintiff in error in their full strength. We contend, that the question as to whether the Missouri, Kansas & Texas railway company had the right, under the act of July 26, 1866, to select the land in controversy as indemnity land, if decided against the company, is not conclusive of the right of the plaintiff in error and his grantees to the land in controversy. The plaintiff in error and his grantees are entitled to the land as purchasers thereof in good faith from the railway company. As was said by Judge Sanborn, in the case of

United States v. Winona & St. P. Ry. Co., 67 Fed. 948:

"Bona fide purchasers are the especial favorites of courts of equity."

And again he says, in speaking with reference to the protection afforded an innocent purchaser by the act of March 3, 1887:

"There is nothing in that act that indicates any intention on the part of congress to deprive them of any defences or rights they then had under the well established rules of equity jurisprudence. On the other hand, that act grants them additional privileges, and proves that they are especial favorites of congress, as well as of courts of equity.

The record discloses that the defendant in error yielded to the claim of a party who intended to enter upon the land as a homesteader under the settlement laws of the United States, and that no resistance was in any manner attempted. At the time he yielded the land to the claim of the homesteader, the defendant in error was entitled to protection under the act of March 3, 1887, and the subsequent acts to which we have referred, as an innocent purchaser. The fact that he yielded so readily, and immediately thereafter brought this action to recover upon his covenants of warranty from Clark, savors very strongly of collusion between him and the homesteader.

All of which is respectfully submitted.

JAMES HAGERMAN and
T. N. SEDGWICK,

Attorneys for Plaintiff in Error.

J. M. BRYSON,

Of Counsel.

Appendix.

A.

Chap. CXX. An Act to aid in the Construction of a Railroad and Telegraph Line from the Missouri river to the Pacific ocean, and to secure to the Government the Use of the same for Postal, Military and Other Purposes.

* * * * * * * * *

Sec. 2. And be it further enacted, That the right of way through the public lands be, and the same is hereby, granted to said company for the construction of said railroad and telegraph line; and the right, power and authority is hereby given to said company to take from the public lands adjacent to the line of said road, earth, stone, timber, and other materials for the construction thereof; said right of way is granted to said railroad to the extent of two hundred feet in width on each side of said railroad where it may pass over the public lands, including all necessary grounds for station, buildings, workshops and depots, machine shops, switches, side tracks, turntables and water stations. The United States shall extinguish as rapidly as may be the Indian titles to all lands falling under the operation of this act and required for the said right of way and grants hereinafter made.

Sec. 3. And be it further enacted, That there be, and is hereby, granted to the said company, for the purpose of aiding in the construction of said railroad and telegraph line, and to secure the safe and speedy transportation of the mails, troops, munitions of war, and public stores thereon, every alternate section of public land, designated by odd numbers, to the amount of five alternate sections per mile on each side of said railroad, on the line thereof, and within the limits of ten miles on each side of said road, not sold, reserved, or otherwise disposed of by the United States, and to which a pre-emption or homestead claim may not have attached, at the time the line of said road is definitely fixed: Provided, That all mineral lands shall be excepted from the operation of this act; but where the

same shall contain timber, the timber thereon is hereby granted to said company. And all such lands, so granted by this section, which shall not be sold or disposed of by said company within three years after the entire road shall have been completed, shall be subject to settlement and pre-emption, like other lands, at a price not exceeding one dollar and twenty-five cents per acre, to be paid to said company.

Sec. 4. And be it further enacted, That whenever said company shall have completed forty consecutive miles of any portion of said railroad and telegraph line, ready for the service contemplated by this act, and supplied with all necessary drains, culverts, viaducts, crossings, sidings, bridges, turnouts, watering places, depots, equipments, furniture, and all other appurtenances of a first class railroad, the rails and all the other iron used in the construction and equipment of said road to be American manufacture of the best quality, the President of the United States shall appoint three commissioners to examine the same and report to him in relation thereto; and if it shall appear to him that forty consecutive miles of said railroad and telegraph line have been completed and equipped in all respects as required by this act, then, upon certificate of said commissioners to that effect, patents shall issue conveying the right and title to said lands to said company, on each side of the road as far as the same is completed, to the amount aforesaid; and patents shall in like manner issue as each forty miles of said railroad and telegraph line are completed, upon certificate of said commissioners. Any vacancies occurring in said board of commissioners by death, resignation, or otherwise, shall be filled by the President of the United States: Provided, however, That no such commissioners shall be appointed by the President of the United States unless there shall be presented to him a statement, verified on oath by the president of said company, that such forty miles have been completed, in the manner required by this act, and setting forth with certainty the points where such forty miles begin and where the same end; which oath shall be taken before a judge of a court of record.

* * * * * * * * *

Sec. 7. And be it further enacted, That said company shall file their assent to this act, under the seal of said company, in the Department of the Interior, within one year after the passage of this act, and shall complete said railroad and telegraph from the point of beginning as herein provided, to the western boundary of Nevada Territory before the first day of July, one thousand eight hundred and seventy-four: Provided That within two years after the passage of this act said company shall designate the general route of said road, as near as may be, and shall file a map of the same in the Department of the Interior, whereupon the Secretary of the Interior shall cause the land within fifteen miles of said designated route or routes to be withdrawn from pre emtion, private entry, and sale; and when any portion of said route shall be finally located, the Secretary of the Interior shall cause the said lands herein before granted to be surveyed and set off as fast as may be necessary for the purposes herein named: Provided, That in fixing the point of connection of the main trunk with the eastern connections, it shall be fixed at the most practicable point for the construction of the Iowa and Missouri branches, as hereinafter provided.

Sec. 8. And be it further enacted, That the line of said railroad and telegraph shall commence at a point on the one hundredth meridian of longitude west from Greenwich, between the south margin of the valley of the Republican River and the north margin of the valley of the Platte River, in the Territory of Nebraska, at a point to be fixed by the President of the United States, after actual surveys; thence running westerly upon the most direct, central, and practicable route through the territories of the United States, to the western boundary of the Territory of Nevada, there to meet and connect with the line of the Central Pacific Railroad Company of California.

Sec. 9. And be it further enacted, That the Leavenworth, Pawnee, and Western Railroad Company of Kansas are hereby authorized to construct a railroad and telegraph line, from the Missouri river at the mouth of the Kansas river, on the south side thereof, so as to

connect with the Pacific Railroad of Missouri, to the aforesaid point, on the one hundredth meridian of longitude west from Greenwich, as herein provided, upon the same terms and conditions in all respects as are provided in this act for the construction of the railroad and telegraph line first mentioned, and to meet and connect with the same at the meridian of longitude aforesaid; and in case the general route or line of road from the Missouri River to the Rocky Mountains should be so located as to require a departure northwardly from the proposed line of said Kansas Railroad before it reaches the meridian of longitude aforesaid, the location of said Kansas road shall be made so as to conform thereto; and said railroad through Kansas shall so be located between the mouth of the Kansas River, as aforesaid, and the aforesaid point, on the one hundredth meridian of longitude, that the several railroads from Missouri and Iowa, herein authorized to connect with the same, can make connection within the limits prescribed in this act, provided the same can be done without deviating from the general direction of the whole line to the Pacific coast. The route in Kansas, west of the meridian of Fort Riley, to the aforesaid point, on the one hundredth meridian of longitude, to be subject to the approval of the President of the United States, and to be determined by him on actual survey. And said Kansas company may proceed to build said railroad to the aforesaid point, on the one hunredth meridian of longitude west from Greenwich, in the territory of Nebraska. The Central Pacific Railroad Company of California, a corporation existing under the laws of the State of California, are hereby authorized to construct a railroad and telegraph line from the Pacific coast at or near San Francisco, or the navigable waters of the Sacramento River, to the eastern boundary of California, upon the same terms and condition, in all respects, as are contained in this act for the construction of said railroad and telegraph line first mentioned, and to meet and connect with the first mentioned railroad and telegraph line on the eastern boundary of California. Each of said companies shall file their acceptance of the conditions of this act in the Department of the Interior within six months after the passage of this act.

Approved July 1, 1862.

(12 U. S. Statutes at Large, page 489.)

B.

Chap. CCXVI. An act to amend an Act entitled "An Act to aid in the Construction of a Railroad and Telegraph line from the Missouri River to the Pacific Ocean, and to secure to the Government the Use of the same for Postal, Military and other Purposes," approved July first, eighteen hundred and sixty-two.

* * * * * * * * *

Sec. 4 And be it further enacted, That section three of said act be hereby amended by striking out the word "five," where the same occurs in said section, and by inserting in lieu thereof the word "ten," and by striking out the word "ten," where the same occurs in said section, and by inserting in lieu thereof the word "twenty." And section seven of said act is hereby amended by striking out the word "fifteen," where the same occurs in said section, and inserting in lieu thereof the word "twenty-five." And the term "mineral land," wherever the same occurs in this act, and the act to which this is an amendment, shall not be construed to include coal and iron land. And any lands granted by this act, or the act to which this is an amendment, shall not defeat or impair any pre-emption homestead, swamp land, or other lawful claim, nor include any government reservation or mineral lands, or the improvements of any bona fide settler, or any lands returned and denominated as mineral lands, and the timber necessary to support his said improvements as a miner, or agriculturist, to be ascertained under such rules as have been or may be established by the commissioner of the general land-office, in conformity with the provisions of the pre-emption laws: Provided that that the quantity thus exempted by the operation of this act, and the act to which this act is an amendment, shall not exceed one hundred and sixty acres for each settler who claims as an agriculturist, and such quantity for each settler who claims as a miner, as the said commissioner may establish by general regulation: Provided, also, That the phrase "but where the same shall contain timber, the timber thereon is hereby

granted to said company," in the proviso to said section three, shall not apply to the timber growing or being on any land farther than ten miles from the centre line of any one of said roads or branches mentioned in said act, or in this act. And all lands shall be excluded from the operation of this act, and of the act to which this act is an amendment, which were located, or selected to be located, under the provisions of an act entitled "an act donating lands to the several states and territories which may provide colleges for the benefit of agriculture and the mechanic arts," approved July second, eighteen hundred and sixty-two, and notice thereof given in the proper land-office.

Sec. 5. And be it further enacted, That the time for designating the general route of said railroad, and of filing the map of the same, and the time for the completion of that part of the railroads required by the terms of said act of each company, be, and the same is hereby, extended one year from the time in said act designated; and that the Central Pacific Railroad Company of California shall be required to complete twenty-five miles of their said road in each year thereafter, and the whole to the state line within four years, and that only one half of the compensation for services rendered for the government by said companies shall be required to be applied to the payment of the bonds issued by the government in aid of the construction of said roads.

* * * * * * * * *

Approved, July 2, 1864.

(13 U. S. Statutes at Large, page 356.)

C.

Chap. CLIX. An Act to amend an Act entitled "An Act to amend an Act entitled 'An Act to aid in the Construction of a Railroad and Telegraph Line from the Missouri River to the Pacific Ocean, and to secure to the Government the Use of the same for Postal, Military and other Purposes,' approved July 1, 1862," approved July 2, 1864.

Be it enacted by the Senate and House of Repre-

sentatives of the United States of America in Congress assembled, That the Union Pacific Railway Company, eastern division, is hereby authorized to designate the general route of their said road and to file a map thereof, as now required by law, at any time before the first day of December, eighteen hundred and sixty-six; and upon the filing of the said map, showing the general route of said road, the lands along the entire line thereof, so far as the same may be designated, shall be reserved from sale by order of the Secretary of the Interior: Provided, That said company shall be entitled to only the same amount of the bonds of the United States to aid in the construction of their line of railroad and telegraph as they would have been entitled to if they had connected their said line with the Union Pacific railroad on the one hundredth degree of longitude as now required by law: And provided further, That said company shall connect their line of railroad and telegraph with the Union Pacific railroad, but not at a point more than fifty miles westwardly from the meridian of Denver, in Colorado.

Sec. 2. And be it further enacted, That the Union Pacific Railroad Company, with the consent and approval of the Secretary of the Interior, are hereby authorized to locate, construct and continue their road from Omaha, in Nebraska Territory, westward, according to the best and most practicable route, and without reference to the initial point on the one hundredth meridian of west longitude, as now provided by law, in a continuous completed line, until they shall meet and connect with the Central Pacific Railroad Company of California; and the Central Pacific Railroad Company of California, with the consent and approval of the Secretary of the Interior, are hereby authorized to locate, construct and continue their road eastward, in a continuous completed line, until they shall meet and connect with the Union Pacific Railroad: Provided, That each of the above-named companies shall have the right, when the nature of the work to be done, by reason of deep cuts and tunnels, shall for the expeditious construction of the Pacific railroad require it, to work for an extent of not to exceed three hundred miles in advance of their continuous completed lines.

Approved July 3, 1866.

(14 U. S. Statutes at Large, page 79.)

D.

Chap. XX. An Act restoring Lands to Market along the Line of the Pacific Railroads and Branches.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That nothing in the act approved July first, eighteen hundred and sixty-two, entitled, "An act to aid in the construction of a railroad and telegraph line from the Missouri river to the Pacific ocean, and to secure to the government the use of the same for postal, military and other purposes," and the acts amendatory thereof, shall be held to authorize the withdrawal or exclusion from settlement and entry, under the provisions of the pre-emption or homestead laws, the even-numbered sections along the routes of the several roads therein mentioned which have been or may be hereafter located: Provided, That such sections shall be rated at two dollars and fifty cents per acre, and subject only to entry under those laws; and the Secretary of the Interior be, and is hereby, authorized and directed to restore to homestead settlement, pre-emption, or entry, according to existing laws, all the even-numbered sections of land belonging to the government, and now withdrawn from market, on both sides of the Pacific railroad and branches, wherever said roads and branches have been definitely located.

Approved March 6, 1868.

(15 U. S. Statutes at Large, page 39.)

E.

Chap. 376. An Act to provide for the adjustment of land grants made by Congress to aid in the construction of railroads and for the forfeiture of unearned lands, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Con-

gress assembled, That the Secretary of the Interior be, and is hereby authorized and directed to immediately adjust, in accordance with the decisions of the supreme court, each of the railroad land grants made by Congress to aid in the construction of railroads and heretofore unadjusted.

Sec. 2. That if it shall appear, upon the completion of such adjustments respectfully, or sooner, that lands have been, from any cause, heretofore erroneously certified or patented, by the United States, to or for the use or benefit of any company claiming by, through, or under grant from the United States, to aid in the construction of a railroad, it shall be the duty of the Secretary of the Interior to thereupon demand from such company a relinquishment or reconveyance to the United States of all such lands, whether within granted or indemnity limits; and if such company shall neglect or fail to so reconvey such lands to the United States within ninety days after the aforesaid demand shall have been made, it shall thereupon be the duty of the Attorney-General to commence and prosecute in the proper courts the necessary proceedings to cancel all patents, certification, or other evidence of title heretofore issued for such lands, and to restore the title thereof to the United States.

Sec. 3. That if, in the adjustment of said grants, it shall appear that the homestead or pre-emption entry of any bona fide settler has been erroneously canceled on account of any railroad grant or the withdrawal of public lands from market, such settler upon application shall be reinstated in all his rights and allowed to perfect his entry by complying with the public land laws: Provided, That he has not located another claim or made an entry in lieu of the one so erroneously cancelled: And provided also, That he did not voluntarily abandon said original entry: And provided further, That if any of said settlers do not renew their application to be reinstated within a reasonable time, to be fixed by the Secretary of the Interior, then all such unclaimed lands shall be disposed of under the public land laws, with priority of right given to bona fide purchasers of said unclaimed lands, if any, and if

there be no such purchasers, then to bona fide settlers residing thereon.

Sec. 4. That as to all lands, except those mentioned in the foregoing section, which have been so erroneously certified or patented as aforesaid, and which have been sold by the grantee company to citizens of the United States, or to persons who have declared their intention to become such citizens, the person or persons so purchasing in good faith, his heirs or assigns, shall be entitled to the land so purchased, upon making proof of the fact of such purchase at the proper land office, within such time and under such rules as may be prescribed by the Secretary of the Interior, after the grants respectively shall have been adjusted; and patents of the United States shall issue therefor, and shall relate back to the date of the original certification or patenting, and the Secretary of the Interior, on behalf of the United States, shall demand payment from the company, which has so disposed of such lands of an amount equal to the Government price of similar lands; and in case of neglect or refusal of such company to make payment as hereafter specified, within ninety days after the demand shall have been made, the Attorney-General shall cause suit or suits to be brought against such company for the said amount: Provided, That nothing in this act shall prevent any purchaser of lands erroneously withdrawn, certified, or patented as aforesaid from recovering the purchase-money therefor from the grantee company, less the amount paid to the United States by such company as by this act required: And provided, That a mortgage or pledge of said lands by the company shall not be considered as a sale for the purpose of this act, nor shall this act be construed as a declaration of forfeiture of any portion of any land-grant for conditions broken, or as authorizing an entry for the same, or as a waiver of any rights that the United States may have on account of any breach of said conditions.

Sec. 5. That where any said company shall have sold to citizens of the United States, or to persons who have declared their intention to become such citizens, as a part of its grant, lands not conveyed to or for the

use of such company, said lands being the numbered sections prescribed in the grant, and being coterminous with the constructed parts of said road, and where the lands so sold are for any reason excepted from the operation of the grant to said company, it shall be lawful for the bona fide purchaser thereof from said company to make payment to the United States for said lands at the ordinary government price for like lands, and thereupon patents shall issue therefor to the said bona fide purchaser, his heirs or assigns: Provided, That all lands shall be excepted from the provisions of this section which at the date of such sales were in the bona fide occupation of adverse claimants under the pre-emption or homestead laws of the United States, and whose claims and occupation have not since been voluntarily abandoned, as to which excepted lands the said pre-emption and homestead claimants shall be permitted to perfect their proofs and entries and receive patents therefor: Provided further, That this section shall not apply to lands settled upon subsequent to the first day of December, eighteen hundred and eighty-two, by persons claiming to enter the same under the settlement laws of the United States, as to which lands the parties claiming the same as aforesaid shall be entitled to prove up and enter as in other like cases.

* * * * * * * * *

Approved March 3, 1887.

(24 U. S. Statutes at Large, page 556.)

F.

Chap. 559. An act to amend section eight of an act approved March third, eighteen hundred and ninety-one, entitled "An act to repeal timber culture laws and for other purposes."

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That section eight of an act entitled, "An act to repeal timber culture laws, and for other purposes," approved March third, eighteen hundred and ninety-one, be and the same is hereby amended so as to read as follows:

Sec. 8. That suits by the United States to vacate

and annul any patent heretofore issued shall only be brought within five years from the passage of this act and suits to vacate and annul patents hereafter issued shall only be brought within six years after the date of the issuance of such patents. And in the States of Colorado, Montana, Idaho, North Dakota and South Dakota, Wyoming, and the District of Alaska, and the gold and silver regions of Nevada and the Territory of Utah in any criminal prosecution or civil action by the United States for a trespass on such public timber lands or to recover timber or lumber cut thereon it shall be a defense if the defendant shall show that the said timber was so cut or removed from the timber lands for use in such State or Territory by a resident thereof for agricultural, mining, manufacturing or domestic purposes under rules and regulations made and prescribed by the Secretary of the Interior and has not been transported out of the same, but nothing herein contained shall operate to enlarge the rights of any railway company to cut timber on the public domain, provided that the Secretary of the Interior may make suitable rules and regulations to carry out the provisions of this act, and he may designate the sections or tracts of land where timber may be cut, and it shall not be lawful to cut or remove any timber except as may be prescribed by such rules and regulations, but this act shall not operate to repeal the act of June third, eighteen hundred and seventy-eight, providing for the cutting of timber on mineral lands.

Approved March 3, 1891.

(26 U. S. Statutes at Large, page 1093)

G.

Chap. 39. An Act to provide for the extension of the time within which suits may be brought to vacate and annul land patents, and for other purposes.

Be it enacted by the Senate and the House of Representatives of the United States of America and Congress assembled, That suits by the United States to vacate and annul any patent to lands heretofore erroneously issued under a railroad or wagon road grant shall only be brought within five years from the pas-

sage of this Act, and suits to vacate and annul patents hereafter issued shall only be brought within six years after the date of the issuance of such patent, and the limitation of section eight of chapter five hundred and sixty-one of the acts of the second session of the Fifty-first Congress and amendments thereto is extended accordingly as to the patents herein referred to. But no patent to any lands held by a bona fide purchaser shall be vacated or annulled, but the right and title of such purchaser is hereby confirmed: Provided, That no suit shall be brought or maintained, nor shall recovery be had for lands or the value thereof, that were certified or patented in lieu of other lands covered by a grant which were lost or relinquished by the grantee in consequence of the failure of the Government or its officers to withdraw the same from sale or entry.

Sec. 2. That if any person claiming to be a bona fide purchaser of any lands erroneously patented or certified shall present his claim to the Secretary of the Interior prior to the institution of a suit to cancel a patent or certification, and if it shall appear that he is a bona fide purchaser, the Secretary of the Interior shall request that suit be brought in such case against the patentee, or the corporation, company, person, or association of persons for whose benefit the certification was made, for the value of said land, which in no case shall be more than the minium Government price thereof, and the title of such claimant shall stand confirmed. An adverse decision by the Secretary of the Interior on the bona fides of such claimant shall not be conclusive of his rights, and if such claimant, or one claiming to be a bona fide purchaser, but who has not submitted his claim to the Secretary of the Interior, is made a party to such suit, and if found by the court to be a bona fide purchaser, the court shall decree a confirmation of the title, and shall render a decree in behalf of the United States against the patentee, corporation, company, person, or association of persons for whose benefit the certification was made for the value of the land as herein before provided. Any bona fide purchaser of lands patented or certified to a railroad company, and who is not made a party to such

suit, and who has not submitted his claim to the Secretary of the Interior, may establish his right as such bona fide purchaser in any United States court having jurisdiction of the subject, matter, or at his option, as prescribed in sections three and four of chapter three hundred and seventy-six of the Acts of the second session of the Forty-ninth Congress.

Sec. 3. That if any time prior to the institution of suit by the Attorney-General to cancel any patent or certification of lands erroneously patented or certified a claim or statement is presented to the Secretary of the Interior by or on behalf of any person or persons, corporation or corporations, claiming that such person or persons, corporation or corporations, is a bona fide purchaser or are bona fide purchasers of any patented or certified land by deed or contract, or otherwise, from or through the original patentee or corporation to which patent or certification was issued, no suit or action shall be brought to cancel or annul the patent or certification for said land until such claim is investigated in said Department of the Interior; and if it shall appear that such person or corporation is a bona fide purchaser as aforesaid, or that such persons or corporations are such bona fide purchasers, then no such such suit shall be instituted and the title of such claimant or claimants shall stand confirmed; but the Secretary of the Interior shall request that suit be brought in such case against the patentee, or the corporation, company, person, or association of persons for whose benefit the patent was issued or certification was made for the value of the land as hereinbefore specified.

Approved, March 2, 1896

(Laws of 1896.)

Chap. CCLXX. An Act granting Lands to the State of Kansas to aid in the construction of a southern branch of the Union Pacific Railway and Telegraph, from Fort Riley, Kansas, to Fort Smith, Arkansas.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress

assembled, That for the purpose of aiding the Union Pacific railroad company, southern branch, the same being a corporation organized under the laws of the state of Kansas to construct and operate a railroad from Fort Riley, Kansas, or near said military reservation, thence down the valley of the Neosho river to the southern line of the state of Kansas, with a view to an extension of the same through a portion of the Indian Territory to Fort Smith, Arkansas, there is hereby granted to the state of Kansas, for the use and benefit of said railroad company every alternate section of land or parts thereof designated by odd numbers, to the extent of five alternate sections per mile on each side of said road and not exceeding in all ten sections per mile; but in case it shall appear that the United States have, when the line of said road is definitely located, sold any section, or any part thereof, granted as aforesaid, or that the right of pre-emption or homestead settlement has attached to the same, or that the same has been reserved by the United States for any purpose whatever, then it shall be the duty of the Secretary of the Interior to cause to be selected for the purposes aforesaid, from the public lands of the United States nearest to the sections above specified, so much land as shall be equal to the amount of such lands as the United States have sold, reserved, or otherwise appropriated, or to which the right of homestead settlement or pre-emption has attached as aforesaid, which lands, thus indicated by the direction of the Secretary of the Interior, shall be reserved and held for the state of Kansas for the use of said company by the said Secretary for the purpose of the construction and operation of said railroad, as provided by this act: *Provided*, That any and all lands heretofore reserved to the United States by any act of Congress, or in any other manner by competent authority, for the purpose of aiding in any object of internal improvement or other purpose whatever, be, and the same are hereby, reserved and excepted from the operation of this act, except so far as it may be found necessary to locate the route of said road through such reserved lands, in which case the right of way, two hundred feet in width, is hereby granted, subject to the approval of the President of the United States: *And provided, further*, That said lands

hereby granted shall not be selected beyond twenty miles from the line of said road.

Sec. 2. *And be it further enacted*, That the sections and parts of sections of land by which the aforesaid grant shall remain in the United States, within ten miles on each side of said road, shall not be sold for less than double the minimum price of public lands when sold: *Provided*, That actual bona fide settlers under the pre-emption laws of the United States, may, after due proof of settlement, improvement and occupation, as now provided by law, purchase the same at the price fixed for said lands at the date of such settlement, improvement, and occupation: *Provided, also*, That settlers under provisions of the homestead act, who make their settlement after the passage of this act and comply with the terms and requirements of said act, shall be entitled, within the said limits of ten miles, to patents for an amount not exceeding eighty acres each.

Sec. 3. *And be it further enacted*, That the grant of lands hereby made is upon condition that said company, after the construction of its road, shall keep it in repair and use, and shall at all times transport troops, munitions of war, supplies, and public stores upon its road for the government of the United States, free from all cost or charge therefor to the government, when required to do so by any department thereof. And the lands hereby granted shall inure to the benefit of said company, as follows: When the governor of the state of Kansas shall certify that any section of ten consecutive miles of said road is completed in a good, substantial and workmanlike manner as a first-class railroad, then the said Secretary of the Interior shall issue to the said company patents for so many sections of the land herein granted within the limits above named, and coterminous with said completed section hereinbefore granted; and when certificates of the governor aforesaid shall be presented to said Secretary of the completion, as aforesaid, of each successive section of ten consecutive miles of said road, the said Secretary shall in like manner issue to said company patents for the land for each of said sections of road as in the

first instance, until said road shall be completed: *Provided*, That if said road is not completed within ten years from the date of the acceptance of the grant hereinbefore made, the lands remaining unpatented shall revert to the United States.

Sec. 4. *And be it futher enacted*, That as soon as said company shall file with the Secretary of the Interior maps of its line, designating the route thereof, it shall be the duty of said Secretary to withdraw from the market the lands granted by this act, in such manner as may be best calculated to effect the purposes of this act and subserve the public interest.

Sec. 5. *And be it futher enacted*, That the United States mail shall be transported on said road, and under the direction of the Post Office Department, at such price as Congress may by law provide: *Provided* That until such price is fixed by law the Postmaster-General shall have power to fix the compensation.

Sec. 6. *And be it further enacted*, That the right of way through the public lands be, and the same is hereby, granted to said Pacific Railroad Company, southern branch, its successors and assigns, for the construction of a railroad as proposed: and the right is hereby given to said corporation to take from the public lands adjacent to the line of said road material for the construction thereof. Said way is granted to said railroad to the extent of one hundred feet in width on each side of said road where it may pass through the public domain; also all necessary ground for station buildings, work-shops, depots, machine shops, switches, side-tracks, turn-tables and water-stations.

Sec. 7. *And be it further enacted*, That the acceptance of the terms, conditions and impositions of this act by the said Pacific Railroad Company southern branch, shall be signified in writing, under the corporate seal of the said company, duly executed pursuant to the direction of its board of directors first had and obtained, which acceptance shall be made within one year after the passage of this act, and not after-

wards, and shall be deposited with the Secretary of the Interior.

Sec. 8. And be it further enacted, that said Pacific Railroad Company, southern branch, its successors and assigns, is hereby authorized and empowered to extend and construct its railroad from the southern boundary of Kansas, south through the Indian Territory, with the consent of the Indians, and not otherwise, along the valley of Grand and Arkansas river, to Fort Smith, in the state of Arkansas; and the right of way through said Indian Territory is hereby granted to said company, its successors and assigns, to the extent of one hundred feet on each side of said road or roads, and all necessary grounds for stations, buildings, work-shops, machine-shops, switches, side-tracks, turn-tables and water-stations.

Sec. 9. And be it further enacted, That the same grant(s) of lands through said Indian Territory are hereby made as provided in the first section of this act, whenever the Indian title shall be extinguished by treaty or otherwise, not to exceed the ratio per mile granted in the first section of this act: *Provided*, That said lands become a part of the public lands of the United States.

Sec. 10. *And be it further enacted*, That said Pacific Railroad Company, southern branch, its successors and assigns, shall have the right to negotiate with, and acquire title to land for railroad purposes from, any Indian nation or tribe authorized by the United States to dispose of lands, and from any other nation or tribe of Indians through whose lands said railroad may pass, subject to the approval of the United States, or from any company or parties incorporated or authorized for such purposes, by such nation or tribe, or which such parties may have acquired under the laws of the United States.

Sec. 11. And be it further enacted, That any railroad company, chartered under any law of the United States, or of any state, which may have been hereto-

fore or shall hereafter be organized by any act of the Congress of the United States, may connect, unite and consolidate with this railroad company, after the same shall be located to the valley of the Neosho or Grand River, upon just, fair and equitable terms, to be agreed upon between the parties, as shall not be against the public interest, or the interest of the United States.

Approved July 26, 1866.

(14 Statutes at Large, 289.)

No. 223.

Office Supreme Court U.S.
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JAMES H. McKENNEY,
Clerk

Sup. Ct. of Hagerman, Sedgwick
Bryson for P. E.

Supreme Court of the United States,

OCTOBER TERM, 1901.

Filed April 12, 1902.

No. 223.

LEE CLARK, PLAINTIFF IN ERROR,

Against

MONROE D. HERINGTON, DEFENDANT IN ERROR.

IN ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS.

SUPPLEMENTAL BRIEF OF PLAINTIFF IN ERROR.

JAMES HAGERMAN and
T. N. SEDGWICK,
Attorneys for Plaintiff in Error.

J. M. BRYSON,
Of Counsel,

The Foley Railway Printing Company, Parsons, Kansas.

IN THE

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IN ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS.

SUPPLEMENTAL BRIEF.

Since the printing of our former brief in this case, we have seen and read the decision of this court in the case of

United States vs. So. Pac. R. Co., 22 Sup. Ct. Rep., 285, published March 1st, and are impressed with the conviction that it is controlling in the case at bar

as to the question of the validity of the title conveyed by the Missouri, Kansas & Texas Ry. Co. to Clark, and thence through intermediate conveyances to the defendant in error.

In view of what this court said in that case, there is no breach of warranty, because Herington's title is good against all the world, except it would be some homestead or pre-emption claimant whose attempted entry of the land had been cancelled in favor of the grant to the railway company. The agreed statement of facts shows that no homestead or pre-emption claimant of this land has been injured by the decision of the department, allowing the railway company to select the land as indemnity for land lost within the place limits of its grant.

The facts in the case above cited are very similar to the facts in the case at bar. In that case, no patent had issued for the land. In the case at bar no patent had issued for the land at the time of the conveyance by the railway company, or at the time the defendant in error received a deed for it from his immediate grantor.

This court has never decided that lands within the limits of the grant to the Union Pacific, which were also within the indemnity limits of the grant to the M., K. & T. Ry. Co. of July 26, 1866, could not be selected by the latter company as indemnity for lands lost within the place limits. In the above case cited, a judgment had previously been rendered declaring the

grant to the Southern Pacific forfeited, and one of the questions determined was whether purchasers of unpatented lands lying within the limits of the grant, were innocent and bona fide purchasers and entitled to the protection of the act of March 3, 1887, and it was determined that such purchasers are entitled to the protection afforded by that act. For convenience, we here quote all the decision bearing upon this proposition:

Mr. Justice Brewer delivered the opinion of the court:

The questions now to be determined arise between the United States and parties holding title or claiming rights to lands by deed from or contract with the railroad company. The title of the company having been adjudged void, the defendants rely upon the acts of Congress of March 3, 1887 (24 Stat. at L 556. chap. 376), Feb. 12th, 1896, (29 Stat. at L. 6, chap. 18), and March 2, 1896 (29 Stat. at L. 42, chap. 39). These acts were passed for the purpose of upholding the titles of parties who in good faith had purchsed from railroad companies lands which, though supposed to be part of their grants, proved not to be so. This legislation was fully considered in United States v. Winona & St. P. R. Co. 165 U. S. 463, 41 L. ed. 789, 17 Sup. Ct. Rep. 368; and Winona & St. P. R. Co. v. United States, 165 U. S. 483. 41 L. ed. 798. 17. Sup. Ct. Rep. 381, and any further discussion of its scope is unnecessary. In respect to it we said:

"The act of 1896 confirming the right and title of a bona fide purchaser, and providing that the patent to his lands should not be vacated or annulled, must be held to include one who, if not in the fullest sense a

'bona fide purchaser.' has nevertheless purchased in good faith from the railroad company.

* * * * * * * * * *

"Our conclusion is that these acts operate to confirm the title to every purchaser from a railroad company of lands certified or patented to or for its benefit, notwithstanding any mere errors or irregularities in the proceedings of the Land Department, and notwithstanding the fact that the lands so certified or patented were, by the true construction of the land grants, although within the limits of the grants, excepted from their operation, providing that he purchased in good faith, paid value for the lands, and providing, also, that the lands were public lands in the statutory sense of the term, and free from individual or other claims." P. 481, L. ed. p. 797, Sup. Ct. Rep. p. 373.

In the present case the deeds to the patented lands were executed by the company at different dates, commencing July 23, 1885, and ending July 19, 1892. These lands were apparently within the grant made to the Southern Pacific by the act of March 3, 1871 (16 Stat. at L. 573, chap. 122); that is, they were public lands in the statutory sense of the term along the line of the Southern Pacific as authorized by that act and within the place or indemnity limits of the grant. The road had been constructed, and the Land Department of the United States, the tribunal charged with the duty of administering the public lands, had decided that the company had earned the lands, and had caused patents therefor to be issued to it. No third party claimed title; either the government or the company was the owner. Under those circumstances the purchasers bought the lands; bought them in good faith; paid value for them.

These facts bring the case within the 1st section of the act of March 2, 1896, as heretofore construed by

us: "But no patent to any lands held by a bona fide purchaser shall be vacated or annulled, but the right and title of such purchaser is hereby confirmed."

Against this conclusion it is contended that purchasers with notice that the government questioned the company's title to these lands are not bona fide purchasers. And counsel say that 'in the year 1886 every department of the government began to operate to protect the title of the United States to these lands, and in every public way gave notice to the world of the rights of the government to them,' enumerating the act of Congress of July 6, 1886, forfeiting the grant to the Atlantic & Pacific Company; various rulings of the Interior Department, from that on June 7, 1887 (Gordon v. Southern P. R. Co. 5 Land Dec. 691,) to the date of the last deed, to the effect that the lands granted to the Atlantic & Pacific were not operated upon by the subsequent grants to the Southern Pacific, and were by the forfeiture act restored to the public domain; and the commencement of the several suits by the government to establish its title to these lands and others similarly situated. Counsel also refer to Winona & St. P. R. Co. v. United States, 165 U. S. 483, 41 L. ed. 798, 17 Sup. Ct. Rep. 381, in which it was held that one cannot claim to be a purchaser in good faith from a railroad company if at the time he has notice of facts outside the records of the Land Department disclosing a prior right in some third party.

But we do not think a mere change in the opinions of the officers of the government, as to the validity of the company's title, although made known to parties proposing to purchase from such company, is sufficient to take away from them the protection of good faith. A party may have notice of conflicting claims, and still, in the exercise of an honest judgment as to the rightful owner, buy property and pay for it, and be acting in good faith. So far as suits are concerned, all the

decisions of the courts had been, up to the date of the last deed, in favor of the title of the company. Thus the purchasers had not merely the action of the Land Department in issuing the patents, but all past decisions of the courts, justifying their conclusions. The conditions are not like those in Winona & St. P. R. Co. v. United States. That was a suit to cancel a certification of a tract of land made for the benefit of a railroad company, and also a deed from it. The certification was wrongfully made, and the company in fact took no title. The purchaser sought protection under these statutes. Before any certification, or any pretense of right in the company, as well as at the time of the conveyance to its grantee, there was and had been for many years a party in actual possession of the land under a title prima facie regular and valid, and it was held that the grantee, charged with notice of that occupancy and that claim of title, could not be adjudged a bona fide purchaser from the railroad company within the meaning of the statute. 'The statute was not intended to cut off the rights of parties continuing after the certification, and of which at the time of his purchase the purchaser had notice. Only the purely technical claims of the government were waived.' Nothing of that kind appears here; no independent and outside facts are shown, no title in any third party,—simply a change of opinion on the part of the officers of the government as to the validity of the title of the Southern Pacific Company; and it would be harsh indeed if remedial statutes like these were shorn of their beneficent application by reason of the fact that the officials of the government had changed their views of the law. We think the circuit court was right in confirming the title to the lands patented.

With reference to the unpatented lands, they, like the former, were so situated with respect to the constructed road of the Southern Pacific as to be appar-

ently within the scope of its grant, and the same general comments are appropriate here as in reference to the patented land. The act of 1896 refers only to lands patented or certified, and the parties who contracted with the company for unpatented lands must rely for protection upon the act of 1887. Most of the transactions in respect to them were after the date of this act, and it is contended that it is not prospective in its operation, and only purports to protect prior transactions.

The ruling of the Land Department has been to the contrary effect. In Sethman v. Clise, 17 Land Dec. 307, a purchase from the railroad company was made prior to the act of 1887, but after the act the purchaser conveyed to a transferee, and it was held that the latter was entitled to relief under the statute.

'The act directed the manner of making adjustments, and it was the evident intention of Congress, as expressed in the 5th section of the act, that when, in the adjustment of these grants, it was ascertained that land had been bought from the railroad companies for which they could convey no good title, such buyers or their transferees, if bona fide, should be allowed to purchase the tracts claimed by them. And it can make no difference, I think, whether a transferee, otherwise entitled to purchase, bought the land before or after the day of the approval of the act, if it was originally purchased in good faith from any said company.' P. 312.

In Andrus v. Balch, 22 Land Dec. 238, was presented the case of a purchase from the railroad company after the act of March 3, 1887, and it was held that that did not prevent the operation of the act. The same proposition was reaffirmed in Briley v. Beach, 22 Land Dec. 549; Re Seaver, 23 Land Dec. 108; Grandin v. La-Bar, 25 Land Dec. 194; Neilsen v. Central P. R. Co., 26 Land Dec. 252. There has been no decision to the con-

trary. This uniform ruling and practice of the Land Department would in case of doubt, be of great weight in determining the true construction of the act. Knowlton v. Moore, 178 U. S. 41, 56, 92, 44 L. ed. 969, 975, 990, 20 Sup. Ct. Rep. 747; Fairbank v. United States, 181 U. S. 283-306, 44 L. ed. 862–872, 21 Sup. Ct. Rep. 648.

But the act itself bears upon its face evidence that it was not intended to be limited to cases of purchases from the railroad company prior to its date. While the 1st section directs the Secretary of the Interior "to immediately adjust" the several land grants, § 3 provides "that if, in the adjustment of said grants it shall appear that the homestead or pre-emption entry of any bona fide settler has been erroneously cancelled on account of any railroad grant, or the withdrawal of public lands from market, such settler upon application shall be reinstated in all his rights, and allowed to perfect his entry by complying with the public land laws." This seems to imply an intent that all mistakes of the nature referred to which shall have occurred up to the very completion of the adjustment may be rectified. Section 4 makes provision for the issue of patents to certain purchasers from railroad companies, providing proof shall be made "within such time and under such rules as may be prescribed by the Secretary of the Interior, after the grants respectively shall have been adjusted." While other sections may not be so specific, yet, placing them along side of those from which quotations have been made, it is reasonable to hold that the act applies not merely to transactions had before its date, but to any had before the time of final adjustment. In this case the several grants to the Southern Pacific have not yet been finally adjusted. Further, it may be borne in mind that this is a remedial statute, and is to be construed literally, and so as to effectuate the purpose of Congress and secure the

relief which was designed; and the mere date of the transaction between the purchaser and the railroad company is not itself vital in determining whether there is or is not an equity in behalf of the purchaser. As said in Potter's Dwarris on Statutes, 231:

"A remedial act shall be so construed as most effectually to meet the beneficial end in view, and to prevent a failure of the remedy. As a general rule, a remedial statute ought to be construed liberally. Receiving an equitable, or rather a benignant, interpretation, the letter of the act will be sometimes enlarged sometimes restrained, and sometimes it has been said the construction made is contrary to the letter; which should be read, ultra the letter, and confined to ancient statutes."

See also the letter of Attorney General Garland to the Secretary of the Interior, in response to a question as to the true construction of this act. 6 Land Dec 275.

"The whole scope of the law from the 2d to the 6th sections, inclusive, is remedial. Its intent is to relieve from loss settlers and bona fide purchasers who, through the erroneous or wrongful disposition of the lands in the grants, by the officers of the government, or by the railroads, have lost their rights or acquired equities. . . . The 5th section expressly refers to such lands as had been sold, which had not been conveyed 'to or for the use of such companies.' It is not required that the sale by the railroad companies shall have been made on its part in good faith, but only that the purchaser shall have bought in good faith. That it was sold under a claim of the grant to another in good faith is the ground of his equity."

The remaining question arises on the ruling that one of the defendants, Jackson A. Graves, was a bona fide purchaser, and entitled to the protection of the 5th section of the act of March 3, 1887, and affects something like 35,000 acres. These were purchased from

the railroad company in 1885 by the Atlantic & Pacific Fibre Importing & Manufacturing Company Limited, a corporation organized under the laws of Great Britain. This suit was commenced on May 17, 1890. On September 25, 189', an amended bill of complaint was filed in which the fibre company was made partly defendant. Its answer was filed March 14, 1892 On January 27, 1893, it conveyed the lands to Graves, who thereafter caused himself to be substituted for it as party defendant. Said § 5, so far as is applicable reads:

"Sec. 5. That where any said company shall have sold to citizens of the United States, or to persons who have declared their intention to become such citizens, as a part of its grant, lands not conveyed to or for the use of such company, said lands being the numbered sections prescribed in the grant, and being conterminous with the constructed parts of said road, and where the lands so sold are for any reason excepted from the operation of the grant to said company, it shall be lawful for the bona fide purchaser thereof from said company to make payment to the United States for said lands at the ordinary government price for like lands, and thereupon patents shall issue therefor to the said bona fide purchaser, his heirs or assigns."

"The fibre company was an alien and therefore not within the terms of the section. Graves, it is true, was a citizen, and the ruling of the department has been that the right of purchase from the government conferred by this section is not limited to the immediate purchaser from the company, but may be exercised by a subsequent grantee who has the neccssary qualifications, and that in such case it is immaterial what were the qualifications of such purchaser. See letter of Secretary Noble to the commissioner of the general land office (11 Land Dec. 229), in which the secretary said:

"It can make no difference, in my judgment, whether the applicant is the immediate purchaser from

the company or a purchaser one or more degrees removed. If he is a bonafide purchaser of the land and has the required qualifications as to citizenship, he is within the intendment of the statute, and if he be not the original purchaser from the company it is immaterial what the qualifications of his immediate grantor, or the intervening purchasers, may have been. If his immediate grantor was a foreigner and his purchase was simply for the purpose of acquiring title from the government for the benefit of the foreigner, he would not be a bona fide purchaser, and would not therefore come within the terms of the act."

Union P. R. Co. v. McKinley, 14 Land Dec. 237.
Union Colony v. Fulmele, 6 Land Dec. 273.
Sethman v. Clise, 17 Land Dec. 307:
Ray v. Gross, 27 Land Dec. 707.

Within the scope of these rulings Graves is entitled to the protection of the statute if he can be considered a bona fide purchaser."

In that portion of the opinion rendered by this court in the above case which we have not quoted, it was determined that Graves was not an innocent purchaser, because he had paid nothing for the land, and therefore did not come within the meaning of the 5th section of the act of March 3, 1887. But in the case at bar it is shown that each of the several immediate and remote grantees of the railway company paid value for the land.

All of which is respectfully submitted.

JAMES HAGERMAN and
T. N. SEDGWICK.
Attorneys for Palintiff in Error.

J. M. BRYSON,
Of Counsel.

IN THE

SUPREME COURT

OF THE

UNITED STATES

OF AMERICA

LEE CLARK,
Plaintiff in Error,
vs.
MONROE D. HERINGTON,
Defendant in Error.

Brief of Defendant in Error

We beg permission of the Court to refer to the report of this case in 56 Kansas, page 644 et seq., for a lucid and full statement of the facts out of which this litigation grew, and upon which the judgment of the Supreme Court of Kansas is based, and in which it is claimed here that Court erred, in not sustaining the contentions of the plaintiff in error, as is set forth in his petition for a writ of error to the State Court.

Printed record, pages 50 and 51.

At that time the Court remanded the case to the trial

court with directions to assess our damages. The trial court did not comply with this mandate, but proceeded to render judgment for the defendant, plaintiff in error, on the agreed statement of facts, as before.

This statement of facts appears at pages 15 to 18 of the printed record.

Upon our petition in error, the Kansas Supreme Court again reversed the trial court and remanded the case with directions to assess our damages. See 60 Kansas Reports, page 855, and pages 45 and 46 of the printed record.

For the third time the Supreme Court determined the case. See page 50, printed record. In a per curiam opinion the Court says in substance that it has three times decided the only questions of law presented, therefore declines to discuss them.

It is therefore necessary to look to the opinion in 56 Kansas, 644, to ascertain what the Court decides, and upon what facts it based its opinion.

The land in controversy is not within the place limits of the grant to the State to aid the construction of the M. K. & T. R. R., or rather its assignor, but is in the indemnity limits. See page 16, printed record, VI. statement of fact.

It is also within the limits of the prior grant to the Union Pacific R. R., Eastern Division, and is an even numbered section.

By the provisions of the act of Congress approved March 6th, 1868, 15 U. S. Statutes at Large, page 39, all even numbered sections within these U. P. grants were reserved as double minimum land. Notwithstanding this, the M. K. &

R. Co. selected this land as indemnity land. The selection was never approved by the Secretary of the Interior, as the granting act required. The selection was made October 22, 1877. See VII. statement of fact, page 17 printed record. The selection was not authorized by law, was in violation of the express provisions of the act of Congress of 1868 cited supra.

The Commissioner of the General Land Office canceled the selection for these reasons. See letter of the acting Commissioner, marked F, page 20 printed record, embodied in the agreed statement of facts. The defendant in error was evicted by the homestead entryman in whose behalf the selection was canceled. See 17th finding of fact, page 18 of the record.

An appeal was allowed the R. R. Co., but it did not avail itself thereof. See 21st finding of fact, page 18 printed record. Patent was issued to entryman October 15, 1890. Page 36 printed record.

In the statement of the case, in the brief of counsel for plaintiff in error, filed in the State Supreme Court, it is said: "It is admitted in the agreed statement of facts that the selection of land by the railway company was in all respects conformable to the rules of the department; that the proper fees had been paid and that a certificate in due form had been issued and delivered to the company. * * * No claim of a want of power or authority in the department is made."

Whether this will be again asserted in this Court we have no means of knowing at this time. The last part of our reply, on page 15 of the record, is to the contrary; our briefs have been to the contrary and it is not supported by the findings of fact except as to the first part.

The company selected the land in accordance with the rules of the department. This is covered by the seventh statement of fact. It is not admitted now, never was admitted, that the selection was approved by the Secretary of the Interior as required by section 1 of the granting act, nor that a certificate was issued. Neither have we ever admitted in any manner that the department had power or authority to make or approve the selection. On the contrary, we have always contended that there was no approval by the Secretary of the Interior,—that no certificate ever issued for the land. Our contention has always been, and now is, that the tract in controversy was not covered by the grant and that the selection was without lawful authority and in direct conflict with the act of Congress of 1868, cited supra.

This land was not within the grant proper, but within limits wherefrom indemnity land might be taken. It did not pass by the grant, but by selection. At the time the attempted selection was made this tract had by express act of Congress been withdrawn and reserved, so that it was beyond the jurisdiction of the department to make or approve a selection thereof, and hence the question of bona fide purchaser cannot arise. Until the selection was made and approved, the government retained the title and power of disposal the same as though no grant had been made. See U. S. vs. Mo. Pac. R'y Co., 141 U. S. 360-375, October term, 1891; K. P. Rld. vs. Atchison Rld., 112 U. S. 414-421; Barney vs. W. & St. P. Rly., 117 U. S. 228-232; S. C. etc. Rld. Co. vs. C. M. & St. P. Rld., 117 U. S. 406-408; Wisconsin R. R. Co. vs. Pierce, 133 U. S., pp. 512 to 514 inclusive; Wisconsin R. R. Company, 133 U. S., pp. 512 to 514.

It would seem that this point is pretty well settled When Congress passed the act of 1868, by which it expressly said to the Department of the Interior you shall not select indemnity land under the provisions of any act granting lands to the Union Pacific from the even numbered sections within the U. P. grant; these even numbered sections we reserve expressly and dedicate them to a specific purpose, and we fix the value at $2.50 or double minimum price, the land ceased to be public land. So we say the selection was absolutely without law, against express denial by law, and void.

The contention that Lee Clark was a bona fide purchaser as against the government and all persons claiming from it has no basis in fact to support it. The law was plain. The selection not only being without authority, but in express conflict with the law, could not support a claim of bona fide purchaser.

This Court has said that as to indemnity land it does not pass by the act, but by selection, and until selected is subject to be disposed of by Congress.

Could the Land Department by a mere exclusion of the public, in violation of the right of the government as above set forth by this Court, deprive the government of its title and right of disposition? The mere statement of the proposition is a sufficient refutation.

By the third contention some right is asserted under the act of March 3, 1887. The date of the eviction is July 31, 1886. Now we are at a loss to comprehend how Mr. Herington could in July, 1886, say to Cox, and the government, we will not yield the possession of the land; the Congress in 1887

is going to pass an act by which I may and will have the preference to enter this land under the provisions of that act which Congress is going to pass next year, etc.

The cause of action upon the covenant of warranty had accrued to the defendant in error. The homestead right of Cox had intervened. The act of Congress of 1887 did not operate retrospectively to deprive them of these rights. Had defendant in error remained in possession, and acquired title under the act of 1887, that title would not have been derived by or under or through the grant to the State of Kansas, but from the government directly, because of the wrongful or mistaken acts of the plaintiff in error and of the subordinate officers of the government in its behalf.

The government reserved redress for itself and purchasers against the company, whose wrongful acts it was endeavoring to correct.

I cannot find any grain of comfort for the company or plaintiff in error under this act, either as against the homestead entryman or defendant in error, who yielded to the authority of the government under the law as it existed and before the passage of the act under which the contention is set forth.

Respectfully submitted,

John H. Mahon

Attorney for Defendant in Error.

Seattle, Washington, January 27th, 1902.

No. 223.

Brf. of Mahan for D. E.

Office Supreme Court
FILED
MAR 17 1902
JAMES H. McKENNEY,
Clerk

Filed Mar. 17, 1902.

IN THE

Supreme Court of the United States,

OCTOBER TERM, 1901.

No. 223.

LEE CLARK, PLAINTIFF IN ERROR,

against

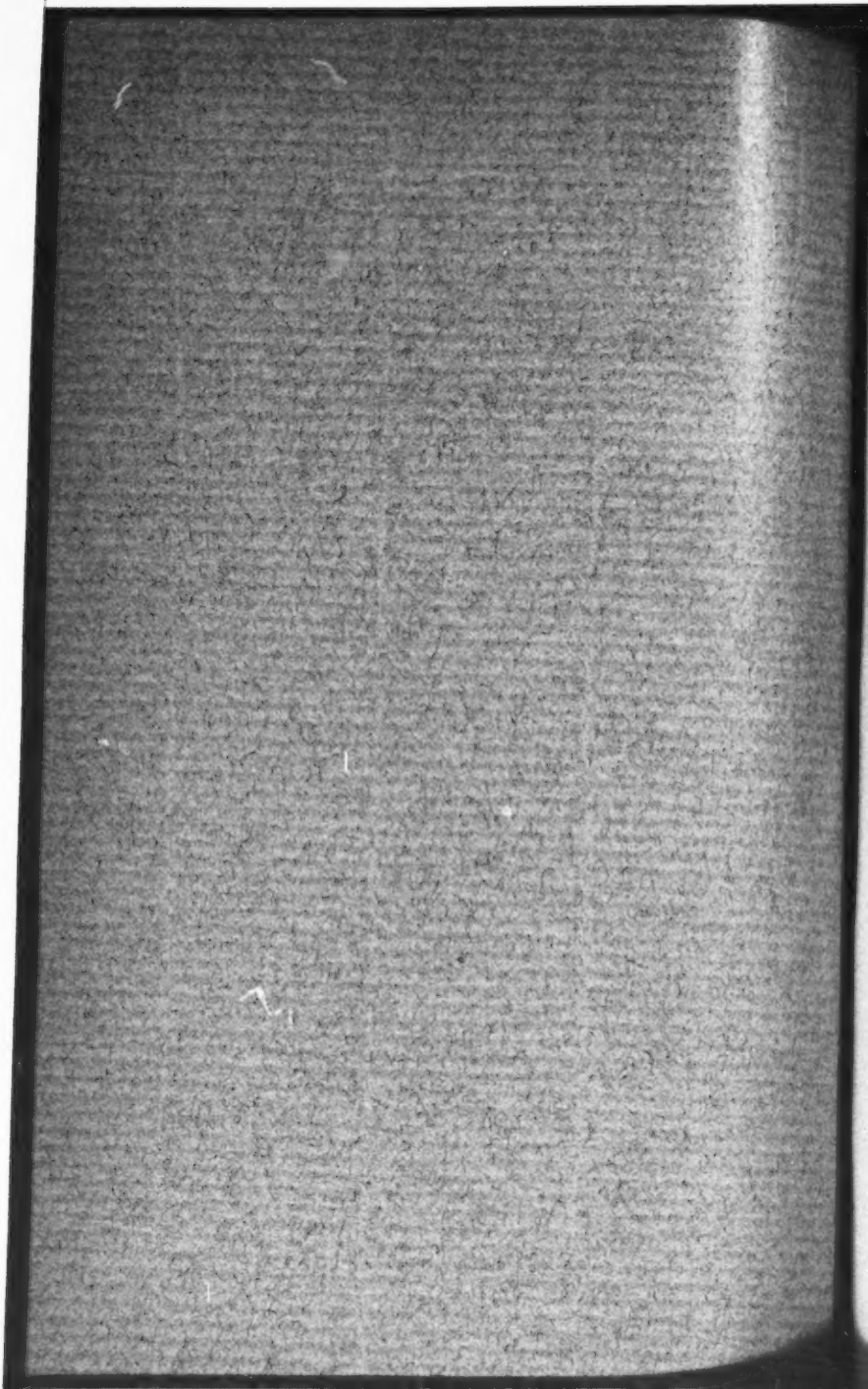
MONROE D. HERINGTON, DEFENDANT IN ERROR.

IN ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS.

BRIEF OF DEFENDANT IN ERROR.

J. H. MAHAN,
Attorney for Defendant in Error.

Denny-Coryell Co., Printers, Seattle.



IN THE

Supreme Court of the United States,

OCTOBER TERM, 1901.

No. 223

LEE CLARK, PLAINTIFF IN ERROR,

vs

MONROE D. HERINGTON, DEFENDANT IN ERROR.

ADDITIONAL BRIFF OF DEFENDANT IN ERROR.

The brief of plaintiff in error having been received by me this morning, March 7th, 1902, I beg leave of the Court to add to my brief on behalf of the defendant in error the matter following:

On page 2 of plaintiff's brief is this statement: "It is "claimed by the defendant in error that the land is" "also within the limits of the grant to the Union" "Pacific Railroad Company of July 1, 1862, (12 Stat." "at Large, 489; also App. A), and the act amendatory"

"thereof of July 2, 1864 (13 Stat. at Large, 356; also"
"App. B). But there is nothing in the record to"
"show this fact, except a reference to it in commis-"
"sioner's letter 'F,' dated May 13th, 1886, which reads"
"as follows :"

The 8th specification of error on page 17 of the brief is, the Supreme Court of Kansas erred in deciding that the land was within the limits of this grant.

In the brief filed in the State Supreme Court on page 9 written by same Counsel occurs this language: "The land is within the limits of the grant to the Union Pacific road, but, being an even numbered section was not covered by the terms of any of the grants to that road." In corroboration of this I have a copy of that brief with the filing mark of the Clerk of that Court which is herewith submitted.

Permit me to say further that this fact never has been controverted before, but has on the contrary on all occasions been treated as an undisputed fact. It is the very pivotal fact upon which the decision is based. The language of counsel now is that the fact was merely referred to by the acting Commissioner in his letter "F." My conception of this letter is that it is a finding of facts and conclusions of law upon a matter within the jurisdiction of the officer conferred by acts of Congress and sustained by the decisions of this Court; an adjudication, from which an appeal was allowed but not taken—see 21 agreed fact p. 18 printed record. This finding of fact by that officer,

the state court was bound to treat as final, conclusive, as to the M. K. & T. R. R. and those claiming under it.

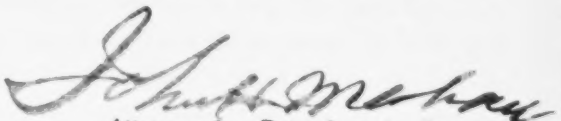
That the attempted selection and certificate from the local land office did not operate to convey title, as argued under the first subdivision of the argument, I call attention to Wisconsin R. R. Co. vs. Price County 133 U. S. p. 511 et seq. deciding that the approval of the Secretary of the Interior was essential to this operation. It is not contended that there was an approval by the Secretary of the Interior, nor was such approval ever had. It is said on page 12, of brief "no claims of want of authority in the department is made". On the contrary, it is upon this want of authority that we grounded this case in the beginning and have stood thereon since. It is the crucial question of the case—see second par. of reply, page 15 printed record.

On page 16 of the brief the date of the eviction of defendant in error is correctly fixed as July 31, 1886. Yet the contention of *bona fide* purchaser under the 2d subdivision of the argument is based on the Act of Congress of 1887 and this Court's decisions thereunder principally. There can be no successful claim of *bona fide* purchaser, in the face of the Act of Congress of 1868, expressly reserving this land as double minimum land.

In response to the last statement on the last page of the brief permit me again to reiterate that the eviction was July 31, 1886; that it was a forcible eviction and

not collusive, see the 17th agreed statement of fact; that it occurred almost a year before the act of March 3, 1887, was passed; that this action was begun in 1889, more than 3 years after the eviction. So that the suggestion of collusion between the plaintiff and the homesteaders is not justified by any fact.

The defendant in error yielded to the authority of the Federal Government; the land was patented to the homesteaders and for almost 13 years he has been contending against the railway company for a restitution of the money he paid for the land and which went into its coffers, by reason of its unauthorized endeavor to procure land to which it had no color of right.



Attorney for Defendant in Error.

Supreme Court of the United States.

No. 223.—October Term, 1901.

Lee Clark, Plaintiff in Error, vs. Monroe D. Herington. } In error to the Supreme Court of the State of Kansas.

[June 2, 1902.]

On May 20, 1899, Monroe D. Herington, the defendant in error, recovered a judgment in the District Court of Labette County, Kansas, against Lee Clark, for the sum of $3,032.28, which judgment was affirmed by the Supreme Court of that State on November 10, 1900. Thereupon the case was brought here on writ of error.

The facts are these: The action was one to recover damages for breach of warranty in the conveyance of a part of section 22, township 15, range 5, in Morris County, Kansas. The tract was outside the place and within the indemnity limits of the land grant made July 26, 1866, (14 Stat. 289,) to the Union Pacific Railroad Company, Southern Branch, a corporation whose name was subsequently changed to Missouri, Kansas and Texas Railroad Company. The railroad company duly constructed its road, and, failing to obtain with the place limits the full quota of lands granted to it, selected, on October 22, 1877, the tract in controversy among others in lieu thereof. At the time of such selection the tract was unimproved and without actual occupation. The selection was approved by the Commissioner of the General Land Office, but no patent was issued. On September 5, 1884, the railroad company conveyed the land to Lee Clark. He conveyed by warranty deed. Herington is a subsequent grantee in the chain of title, and is also the assignee from Clark's immediate grantee of all his rights under Clark's deed, including the right to recover damages for any breach of the covenants therein contained.

The tract was in an even-numbered section and within the place limits of the grant, made by acts of Congress of date July 1, 1862, (12 Stat. 489,) and July 2, 1864, (13 Stat. 356,) to the Union Pacific Railroad Company, Eastern Division.

On July 21, 1886, the selection by the Missouri, Kansas and Texas Railroad Company was canceled by order of the Commissioner of the General Land Office. Notice of this order was given to the railroad company, as also time to appeal therefrom, but no appeal was ever taken. On July 28, 1888, E. M. Cox, who had, on July 31,

1886, taken forcible possession of the land, filed his declaratory statement claiming settlement. On July 26, 1889, he made final proof, paid the government price and received his patent certificate. Thereafter on October 15, 1890, a patent was issued to him.

Mr. Justice BREWER delivered the opinion of the Court.

The paramount Federal question is whether the Missouri, Kansas and Texas Railroad Company was authorized to select as indemnity lands in satisfaction of its grant any even-numbered sections within the place limits of the prior grant to the Union Pacific Railroad Company. Upon this question *United States* v. *Missouri &c. Railway,* (141 U. S. 358,) is cited. The railway company, defendant in that case, is the successor in interest of the Missouri, Kansas and Texas Railroad Company. The act making its land grant is the one referred to in the foregoing statement of facts, as made July 26, 1866. (14 Stat. 289.) It claimed under the authority of that act the right to take as indemnity lands even-numbered sections within the place limits of what is known as the Leavenworth road, in whose benefit a grant was made March 3, 1863. (12 Stat. 772.) The court held against this claim, saying (p. 370):

"Now, it is clear that the *even*-numbered sections, within the place limits of the Leavenworth road, were reserved by the act of 1863, for purposes distinctly declared by Congress, and which might be wholly defeated if the Missouri-Kansas company were permitted to take them as indemnity lands under the act of 1866. The requirement in the second section of the act of 1863, that the 'reserved sections' which 'remained to the United States' within ten miles on each side of the Leavenworth road, 'shall not be sold for less than double the minimum price of the public lands when sold,' nor be subject to sale at private entry until they had been offered at public sale to the highest bidder, at or above the increased minimum price; the privilege given to actual *bona fide* settlers, under the pre-emption and homestead laws, to purchase *those lands* at the increased minimum price, after due proof of settlement, improvement, cultivation and occupancy; and the right accorded to settlers on such sections under the homestead laws, improving, occupying and cultivating the same, to have patents for not exceeding eighty acres each, are inconsistent with the theory that the *even*-numbered sections, so remaining to the United States, within the place limits of the Leavenworth road could be taken as *indemnity* lands for a railroad corporation."

While the two statutes making the Union Pacific railroad grants did not double the price of the even-numbered sections within the place limits, yet that was done by the act of March 6, 1868, (15 Stat. 39,) which in terms provided "that such sections shall be rated at two dollars and fifty cents per acre, and subject only to entry under those (the pre-emption and homestead) laws." The even-numbered sections within the place limits of the Union Pacific railroad grants were from that time therefore not

open to selection as indemnity lands. It is true that this statute was not passed until after the grant to the Missouri, Kansas and Texas Railroad Company, nor until after it had filed its map of definite location with the Secretary of the Interior, which appears from an agreed statement of facts to have been on January 7, 1868, but it was passed before the completed construction of the railroad and long before the selection made by the company, and it is familiar law that no title to indemnity lands is vested until an approved selection has been made, and that up to such time Congress has full power to deal with lands in the indemnity limits as it sees fit. As said in *Kansas Pacific Railroad* v. *Atchison Railroad*, (112 U. S. 414, 421): "Until selection was made the title remained in the government, subject to its disposal at its pleasure." See, also, *Ryan* v. *Railroad Company*, (99 U. S. 382;) *Grinnell* v. *Railroad Company*, (103 U. S. 739;) *Cedar Rapids &c. Railroad* v. *Herring*, (110 U. S. 27;) *St. Paul Railroad* v. *Winona Railroad*, (112 U. S. 720, 731;) *Barney* v. *Winona &c. Railroad*, (117 U. S. 228, 232;) *Sioux City Railroad* v. *Chicago Railway*, (117 U. S. 406, 408;) *Wisconsin Railroad* v. *Price County*, (133 U. S. 496, 511;) *United States* v. *Missouri &c. Railway*, (141 U. S. 358, 375;) *Hewitt* v. *Schultz*, (180 U. S. 139;) *Southern Pacific Railroad Company* v. *Bell*, (183 U. S. 675.)

It is contended by plaintiff in error that the selection by the railroad company, when approved by the Land Department, operated to convey the title as effectively as would a patent to it therefor; that the even-numbered sections within the place limits, although double minimum lands, were public lands and within the jurisdiction of the Land Department, and that hence the approval of the selection by the Land Department, even if erroneous, operated to vest the title in the company. But this is a mistake. The act of Congress provided in terms that such sections should be subject only to entry under the homestead and pre-emption laws, and the Land Department had no more power to turn one of those sections over to a railroad company than it had to grant lands in a military or Indian reservation. While the lands were within the jurisdiction of the Land Department for some purposes they were not for all. The mode of their disposal was limited, and the Land Department had no authority to ignore that limited mode and dispose of them in any other way. This general doctrine as to the limitation of the powers of the Land Department has been affirmed by this court in many cases and under different circumstances. (*Wilcox* v. *Jackson*, 13 Peters, 498; *United States* v. *Stone*, 2 Wall. 525.)

It is further contended that it was not within the powor of the Land Department to cancel the selection by the company, after the conveyance of the land by the company, without notice to all the transferees, and in support thereof *Cornelius* v. *Kessel*, (128 U. S. 456;) *Michigan Land & Lumber*

Co. v. *Rust,* (168 U. S. 589,) and *Hawley* v. *Diller,* (178 U. S. 476,) are cited. It is undoubtedly true, as held in those cases and others, that while the Land Department has full jurisdiction over the disposition of public lands—a jurisdiction which may be exercised until the passing of the legal title by the issue of a patent or otherwise—yet such jurisdiction cannot be exercised so as to destroy any equitable rights without notice to the claimants thereof. While that is true, the courts are not thereby debarred from an inquiry into and a determination of the validity of any equitable title. They do not assume any direct appellate jurisdiction over the rulings of the Land Department, and they accept the findings of that department as conclusive upon questions of fact. (*Shepley* v. *Cowan,* 91 U. S. 330; *Quinby* v. *Conlan,* 104 U. S. 420.) But, notwithstanding this, prior to the issue of any patent a party may have rights in the land of one kind or another which courts will enforce. Thus, where the full equitable title to land has passed from the government to an individual, the land is subject to State taxation, although no patent has issued. (*Carroll* v. *Safford,* 3 How. 441; *Witherspoon* v. *Duncan,* 4 Wall. 210.) Where, prior to the issue of a patent, land in possession of an individual is sought to be charged with State taxes, he may contest in the courts the liability of the land therefor on the ground that full equitable title has not passed to him, or that something yet remains to be done before the rights of the government are ended. (*Railway Company* v. *Prescott,* 16 Wall. 603; *Railway Company* v. *McShane,* 22 Wall. 444.)

Again, even before the acquiring of even an equitable title to the land as against the government, contracts made by actual settlers concerning their possessory rights and the title hoped to be acquired from the United States, may be valid as between the parties thereto, and enforced in the courts. (*Lamb* v. *Davenport,* 18 Wall. 307; *Stark* v. *Starr,* 94 U. S. 477.)

Again, it is a well-known fact that many agricultural lands and many mining claims are held by their owners with only final receipts from the government and without the issue of any patent. Yet the rights which accompany title are exercised by the parties and enforced by the courts.

It will be noticed that this is not an action to recover the possession of any land, or one to quiet the title thereto. It is simply an action to recover damages for the breach of a contract in respect to the land, and the decision, in no respect controlling the action of the officers of the Land Department, is simply a determination of the rights which the parties have acquired by proceeding in the Land Department. This is clearly a matter of ordinary judicial cognizance, and one which by no statute of Congress or rule of the common law is excluded from such cognizance. (*Garland* v. *Wynn,* 20 How. 6; *Monroe Cattle Company* v. *Becker,* 147 U. S. 47, 57; *Turner* v. *Sawyer,* 150 U. S. 578.)

A final contention in this matter is that the plaintiff in error is an innocent purchaser for value, and that, therefore, he and his grantees are entitled to be protected in their title by virtue of the act of March 3, 1887, (24 Stat. 556,) and March 2, 1896, (29 Stat. 42.) It is a sufficient answer to this contention that this defense was not set up in the State courts, and that it does not appear anywhere in the record that Clark, to whom the railroad company conveyed, or any subsequent grantee in the chain of title, was a citizen of the United States or had declared his intention to become a citizen, and hence the act of 1887, which purports to confirm alone the titles of citizens or those who have declared their intention to become citizens, has no application; that the act of 1896 also has no application because that refers only to cases of lands patented or certified, and the confirmations of lands acquired by deed or contract from the party holding the patent or certificate, and here the railroad company never received any patent or certificate. In addition, prior to the passage of the act, a patent had been issued to Cox, and his title thus fully confirmed.

These considerations dispose of the only Federal question presented in the record, and, there appearing no error, the judgment of the Supreme Court of Kansas is

Affirmed.

Mr. Justice GRAY took no part in the decision of this case.

True copy.

Test:

Clerk Supreme Court, U. S.